80-1747

No. 80-

Office-Supreme Court, U.S.
FILED
APR 17 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BETHLEHEM STEEL CORPORATION, E. RICHARD DRIGGERS, JAMES DEAVER and THOMAS R. CONNELLY,

Petitioners,

—against—

ROYSWORTH D. GRANT, WILLIE C. ELLIS and LOUIS MARTINEZ, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WAYNE A. CROSS,
45 Rockefeller Plaza
New York, N.Y. 10111
Telephone: (212) 841-5700

Attorney for Petitioners

CURTIS H. BARNETTE,
KATHLEEN M. MILLS,
Martin Tower
Bethlehem, Pennsylvania 18016
Telephone: (215) 694-2424

ROBERT L. SILLS,
WILLIAM I. SUSSMAN,
REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, N.Y. 10111
Telephone: (212) 841-5700

Of Counsel.

April 17, 1981

Questions Presented

1. Are this Court's opinions in *Furnco Construction Corp. v. Waters*, *Trustees of Keene State College v. Sweeney* and *Texas Department of Community Affairs v. Burdine* limited solely to "disparate treatment" cases or do they apply to "disparate impact" cases under *Griggs v. Duke Power Co.*?

a. Is an employer in a *Griggs v. Duke Power Co.* "disparate impact" case required to bear the additional burden of proving that its hiring policy was the least restrictive available alternative?

b. Does the employer in a "disparate impact" case bear the ultimate burden of disproving discriminatory intent?

2. Can a *prima facie* case of "disparate impact" under *Griggs v. Duke Power Co.* be established by resort to artificial statistics which ignore the legitimate expectations of regular foremen that they will receive continuous employment and which assume instead that all supervisory positions were available to new hires?

3. Can a *prima facie* case of "disparate impact" under *Griggs v. Duke Power Co.* be established by statistics which include manifestly unqualified apprentices and special trainees in the statistical pool for supervisory recruitment, where use of such statistics operates to penalize an employer because of its affirmative efforts to increase minority representation in non-supervisory positions?

4. Is an employer's failure to solicit minority supervisory applications sufficient proof to establish a *prima facie* case of discriminatory treatment?

All of the parties to this Petition are listed in the caption. Bethlehem Steel Corporation has no parent. Its shares are publicly traded. Virtually all of its subsidiaries are either wholly owned directly by it or indirectly through its subsidiaries. None of its subsidiaries or other enterprises in which Bethlehem Steel Corporation owns an interest is known to have publicly traded securities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Bethlehem Steel Corporation, E. Richard Driggers, James Deaver and Thomas R. Connelly (collectively "Bethlehem"), petition for a writ of certiorari to the decision of the United States Court of Appeals for the Second Circuit, dated November 26, 1980, reversing the dismissal of the complaint in this action and remanding to the United States District Court for the Southern District of New York for further proceedings.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 635 F.2d 1007 and is annexed to this Petition as Appendix A.[1] The opinion of the United States District Court for the Southern District of New York is not officially reported, but is annexed as Appendix B.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit was filed on November 26, 1980. Bethlehem's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on January 19, 1981. A copy of the order denying that petition is annexed as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes

The statutory provisions involved in this petition are Sections 703(a) and 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), (h), which are reproduced in relevant part in Appendix C hereto.

Statement of the Case

This is an action commenced under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, by two black and one dark-skinned Puerto Rican ironworkers as a class action, alleging that Bethlehem discriminated against black and Puerto Rican ironworkers in its supervisory appointment practices in the New York City metropolitan area. There was no proof of discrimination by Bethlehem at any time in ironworker hiring.

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1 Page citations to the materials contained in the appendices to this Petition are to the pages of the respective appendices. Thus, references to the District Court's opinion will be "B-3" etc.

On January 2, 1979, the United States District Court for the Southern District of New York dismissed respondents' complaint as to all counts following an eight day trial. (Appendix B).

The United States Court of Appeals for the Second Circuit reversed that dismissal and remanded for more proof on Bethlehem's defenses or, alternatively, for proof on damages. (Appendix A).

This Petition presents the Court with an opportunity to (a) resolve a direct conflict of decision between different courts of appeals, (b) insure uniform adherence to applicable decisions of this Court and (c) clarify important questions of law relating to the allocation of burdens of proof in Title VII cases. The questions presented by this Petition are of fundamental importance to the orderly resolution of hundreds of pending and future Title VII cases brought under the *Griggs v. Duke Power Co.* "disparate impact" theory.

A. Facts

Ironwork includes the erection of steel-framed skyscrapers. Bethlehem was, for many years, a leading factor in structural steel erection. It possessed the industry's best record for safety and efficiency of operations. It closed its erection activities entirely in 1976. This case deals with Bethlehem's supervisory hiring policy on ten separate erection projects (steel framed buildings) in the New York City metropolitan area spanning a seven year period beginning in 1969 and ending with Bethlehem's last project in 1976.

Employment practices in the ironworker trade raise two unique features which pervade the record of this case and this Petition.

First, as in *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943 (1978), because of the episodic nature of ironwork no structural steel erector had a continuous workforce. Each new project was largely staffed by unknown

ironworkers sent out by the union hiring hall. Hiring first level supervisors—foremen—was, however, the exclusive prerogative of Bethlehem.

Second, ironwork is a peculiarly hazardous trade. (B-4). It involves manipulation of huge masses of steel, hundreds of feet above crowded city streets. Ironworkers live with the constant threat of sudden, unexpected death or maiming injury. Their mistakes are usually fatal. (B-4). The public going about its daily business on crowded downtown streets is usually unaware of the danger above and completely at the mercy of the skill of the ironworkers.

There is no dispute that safety was the preeminent concern of all ironworkers and employers. Vigilant foremen were the principal, if not the only, reliable safeguard against this danger.

Thus, there was not any challenge to the District Court's finding with respect to the requirements for the selection of foremen.

> "[T]he job of foreman requires a man with a high degree of safety-consciousness and a personality capable of imbuing in his men a desire to be both safe and productive." (B-4).

Accordingly, the District Court found that it was "impossible" to employ objective standards in hiring foremen and that plaintiffs had suggested none. (B-4).

Because there was no permanent, continuous workforce such as would be present in a steel plant or other manufacturing facility, Bethlehem was required to devise a method of foreman selection which ensured the selection of foremen with the requisite qualities of character to guarantee the safety of its temporary ironworker employees and the unsuspecting public which surrounded its skyscraper projects.

As in *Furnco,* Bethlehem adopted a policy which ideally carried foremen from one project to the next or which con-

sciously sought out foremen from prior Bethlehem projects to work on successive erection projects. Bethlehem's superintendents of erection gave first priority to foremen who had worked with them personally on prior projects. The ultimate goal was to staff each successive project with the same foremen, thereby simulating, to the extent possible, manufacturing plant experience, and reducing the adverse effects of espisodic hiring.

In order to induce its regular foremen to remain loyal and continuously available to Bethlehem, it offered them Bethlehem pensions (in addition to union sponsored plans) and promises of continuous work. These inducements made such foremen as close to full-time foremen as the highly episodic nature of ironwork would permit.

Bethlehem was remarkably successful in seeking out and hiring foremen with prior Bethlehem foreman experience. The trial of this action focused on 126 foreman positions which occurred on 10 projects over a seven year period. Ninety seven of the 126 positions in question were filled by experienced Bethlehem foremen. Far fewer than 97 persons filled those positions since Bethlehem consciously reappointed its experienced foremen on successive jobs. Such reappointment was critical to job safety and efficiency and in developing the legitimate expectations of individual foremen.

There were instances in which Bethlehem's superintendents could not hire experienced Bethlehem foremen because none were available. In those instances the policy was to hire ironworkers with whom the superintendent had personally worked and whom he had observed on prior erection projects, or to obtain recommendations from superintendents for other erection companies.

Of the 29 foremen who were not experienced Bethlehem foremen, 12 had been Bethlehem ironworkers for the hiring superintendents, two more had worked for other companies with the superintendent, one had been a foreman for another New York erector for 20-30 years, and three more had been

fellow instructors with Bethlehem's hiring superintendent in the local union's apprentice program.

Thus, in only 11 out of the 126 cases could it even be argued that Bethlehem hired persons with whose skills the superintendent was unfamiliar.

One of those eleven was black.

Ten percent of Bethlehem's ironworker workforce in New York City was black.[2]

The effectiveness of Bethlehem's selection process in maximizing safety and efficiency is not at issue. Bethlehem's foremen maintained a safety record that was unsurpassed by any other company in the structural steel erection business. Bethlehem's projects were three times as safe as the industry average.

B. The Proceedings Below.

Respondents' claims in this action arose from the fact that one or more of them applied personally to Bethlehem for supervisory work on four occasions and were not appointed as foremen. After trial the District Court dismissed all of respondents' individual claims of discriminatory treatment because they had failed to sustain their burden of proof under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), and *Furnco.* (B-10-14).

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2 Ten percent of Bethlehem's workforce was black or Puerto Rican only because Bethlehem had taken remarkable strides to hire disproportionate numbers of minority apprentices and trainees in order to accelerate the incorporation of those groups into the ironworker trade following their initial entry into the local unions as a result of the decree in *United States v. Local 638, et al.,* 347 F. Supp. 169 (S.D.N.Y. 1972).

Neither the Department of Justice's complaint in that action, nor the decree entered by Judge Gurfein named Bethlehem or suggested that Bethlehem was responsible for any discrimination. It focused entirely on local union membership practices which prevented employers from having access to blacks or Puerto Ricans. Indeed, one of the four major allegations presented by the Government was that the unions refused to refer out blacks who employers wanted to employ. *Id.* at 172.

Respondents offered no evidence of any other black or Puerto Rican ironworker being frustrated in an attempt to obtain a foreman's position with Bethlehem. The District Court found that the approximately 100 black members of the local union were well aware of the lawsuit. Numerous individuals attended the trial. None came forward despite the explicit urging of the District Court at the close of the evidence.[3] Accordingly, the District Court dismissed respondents' claims of discriminatory treatment against a class of black and Puerto Rican ironworkers.

The District Court dismissed respondents' claim of disparate impact under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971), because the statistics proffered to prove such a case contained assumptions which it found were refuted by the record. (B-6-9).

The Court of Appeals reversed the District Court's finding that respondents had failed to prove discriminatory treatment on the ground, *inter alia,* that Bethlehem's failure to solicit respondents or other black or Puerto Rican ironworkers itself constituted discriminatory treatment under *McDonnell Douglas.* (A-21).

The Court of Appeals reversed the District Court's dismissal of respondents' discriminatory impact claim in part because it held that the inclusion of manifestly unqualified apprentices and trainees in the statistical sample was appropriate and that the District Court had erred in failing to credit them. (A-25-26).

Having thus concluded that respondents' statistics were competent to prove a *prima facie* case of discriminatory impact, the Court of Appeals held that Bethlehem's proof that those statistics resulted from a bona fide effort to insure a continuous supervisory workforce was insufficient to rebut respondents' *prima facie* case, because Bethlehem had not disproved the existence of better alternatives. (A-26). Accord-

3 The District Court left the record open for an additional week to permit other aggrieved ironworkers, if any, to come forward.

ingly, it reversed and remanded for further proof by Bethlehem. (A-26).

Summary of Reasons For Granting The Writ

The Court should grant the writ of certiorari in order to resolve a direct conflict of decision between the courts of appeals of different circuits, to insure adherence to fundamental decisions of this Court and to clarify substantial analytical confusion concerning the appropriate allocation of burdens of proof in Title VII cases.

The decision of the Court of Appeals in this action is squarely at odds with that of the United States Court of Appeals for the Sixth Circuit in *Chrisner v. Complete Auto Transit, Inc.*, ____ F.2d ____, No. 78-1337 (6th Cir. March 19, 1981), with respect to the burden of proof imposed on an employer in a disparate impact case brought under *Griggs v. Duke Power Co.* A copy of the Sixth Circuit's slip opinion is annexed hereto as Appendix D.

The decision of the Court of Appeals is also directly contrary to the decisions of this Court in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975), and *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720 (1977).

The Court should also grant the writ because this petition presents four separate, but inextricably related issues concerning the distinction, if any, between the nature, character and burden of proof in a "disparate impact" case under *Griggs* as compared to a "treatment" case under *McDonnell Douglas.* Those issues are of fundamental importance to the orderly resolution of hundreds of pending and future disparate impact cases.

First, the Second Circuit has created a novel and improper burden of proof in "disparate impact" cases by explicitly limiting the holdings of this Court in *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943 (1978), and

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295 (1978), to cases involving "disparate treatment" under Title VII.[4] In so doing it effectively collapsed the three step burden of proof analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), and *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975), into a two step process which includes as part of the second and final step a requirement that Bethlehem prove the absence of discriminatory motive by proving not only that its hiring procedures were reasonably job-related, but also that they maximized promotional opportunities for black and Puerto Rican ironworkers.

That holding is in direct conflict with the recent decision of the Sixth Circuit in *Chrisner v. Complete Auto Transit, Inc., Albemarle,* and *Dothard.*

Moreover, nothing in the words or logic of *Furnco, Sweeney* or *Burdine* justifies the imposition of such a daunting burden on the employers in hundreds of disparate impact cases while the employers in treatment cases need only present "admissible evidence" of a nondiscriminatory explanation for their hiring decisions. *Burdine,* ____ U.S. at ____, 101 S.Ct. at 1094, 1096.

Second, respondents and the Court of Appeals succeeded in characterizing this action as a "disparate impact" case under *Griggs* only by ignoring the legitimate expectation of continuity of employment for Bethlehem's regular foremen and by substituting the fiction that each foreman position which was the subject of proof was reasonably available to be filled by new hires such as respondents. Had the Court of Appeals not ignored the reality of the incumbency rights and expectations of Bethlehem's regular foremen in constructing statistical support for an "impact" theory this action could only have been

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4 *Texas Department of Community Affairs v. Burdine,* ____ U.S. ____, 101 S.Ct. 1089 (1981), had not been decided as of the date of the Court of Appeals' decision. *Burdine* is also directly inconsistent with the decision below unless it is also deemed to be limited to disparate treatment cases.

characterized as a treatment case nearly identical in its facts to *Furnco Construction Corp. v. Waters* and clearly governed by *Furnco*'s burden of proof standard.

Third, contrary to *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736 (1977), the Court of Appeals improperly included admittedly unqualified apprentices and minority trainees in the statistical pool of "qualified" candidates used by it in constructing statistics which it deemed sufficient to create a *prima facie* case of "disparate impact" under *Griggs v. Duke Power Co.* The inclusion of such unqualified ironworkers, who were predominantly black, had the effect of artificially creating liability under Title VII with respect to Bethlehem's supervisory hiring solely because of Bethlehem's affirmative efforts to accelerate minority participation in the ironworker trade.

Finally, the Court of Appeals simply ignored the directly contrary holding of *Furnco* by holding that Bethlehem's concededly admissible evidence of nondiscriminatory reasons for not hiring the individual respondents could not, as a matter of law, satisfy its burden of rebutting a *prima facie* case under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), because Bethlehem had failed to solicit the respondents or other black ironworkers.

Reasons For Granting The Writ

I. *FURNCO, SWEENEY* AND *BURDINE* ARE NOT LIMITED TO "TREATMENT" CASES.

The Court of Appeals drastically limited *Furnco Construction Corp. v. Waters* and *Board of Trustees of Keene State College v. Sweeney,* by holding that they apply only to disparate treatment cases. By that holding it imposed a wholly new burden on employers in impact cases of proving that their policies are not only job related but also the least restrictive ones available. The imposition of that new burden presents a question of federal law of fundamental importance in hundreds of "impact" cases.

Thus, the Court of Appeals explicitly held that in a disparate impact case "[*t*]*he employer's burden of proving job-relatedness [of the hiring practice] is greater than its burden of merely showing a legitimate, non-discriminatory reason in response to a claim of discriminatory treatment*". *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980) (emphasis added). (A-17).

The Court of Appeals recognized that Bethlehem had presented evidence that it had adopted a policy of hiring experienced Bethlehem foremen in preference to other ironworkers. Thus, it conceded that "[t]o the extent that Bethlehem superintendents may have been justified in selecting foremen from the ranks of Bethlehem employees having experience in that job, *this represents a defense based on business necessity. . . .*" *Id.* at 1018 (emphasis added). (A-23).[5]

The Court of Appeals also conceded that Bethlehem's articulated policy of preferring its own experienced foremen resulted in its hiring 97 of 126 foremen. *Id.* at 1010. (A-8). Nor is there any dispute that Bethlehem's hiring practice was effective in promoting safety and efficiency.

Notwithstanding this extensive proof of job-relatedness and business necessity, and its own concession that such proof was "a defense based on business necessity", the Court of Appeals held that "*the evidence thus far introduced is insufficient to meet the burden on the defendants*" of proving that "their discriminatory conduct may have been justified by business necessity". *Id.* at 1020 (emphasis added). (A-26).

There is no question that if the Court of Appeals had applied the standards of *Furnco, Sweeney* and *Burdine* to Bethlehem's proof, it would have concluded that Bethlehem had met its burden of rebutting respondents' *prima facie* case and that the ultimate burden of proving that Bethlehem's policy was merely a pretext to mask discrimination would have

5 While the Court of Appeals expressed its own skepticism about the bona fides of Bethlehem's articulated policy, it did not make a finding that the policy was a "pretext" for discrimination.

shifted back to respondents. That it did not reach that conclusion is attributable only to its holding that those cases simply do not apply to an impact case brought under *Griggs v. Duke Power Co.*

The linchpin of the Court of Appeals' decision is its holding that, extensive proof of the job-relatedness notwithstanding, " '[i]f the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued' ". *Id.* at 1015 (citations omitted). (A-18). Thus, it speculated (as did the Court of Appeals in *Furnco*) that "[i]t would not have created any substantial difficulty for supervisors to maintain a pool of 'eligibles' to be notified of foreman openings, from whom they would choose the foremen for new projects. Such a pool would undoubtedly have contained some qualified blacks." *Id.* at 1019. (A-26).[6]

Having concluded that there must have been a "better" way to accomplish the same business goals, the Court of Appeals held that Bethlehem's failure to rebut that "better" way at the second stage of proof constituted a failure to satisfy its burden of rebutting a *prima facie* case by proving business necessity. Bethlehem submits that the imposition of such an additional burden is unwarranted and potentially disabling to all employers who may seek to defend against "impact" cases.

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6 In support of its speculative exercise the Court of Appeals noted that Bethlehem had promulgated a promotion evaluation procedure for use in its steel plants which contemplated evaluation of all steelworkers with more than five years continuous service to determine supervisory potential. Respondents adduced no evidence that the proferred "alternative" would, in fact, have been less restrictive. No black ironworker worked for Bethlehem for a total of five years cumulatively, much less continuously. Thus, the Court's speculation is not only without foundation but is refuted by the record. Use of the only alternative proposed by respondents would have resulted in no blacks in the pool, and even lower opportunity.

A. The Court Should Grant The Writ In Order To Resolve The Direct Conflict With The Decision Of The Sixth Circuit In *Chrisner v. Complete Auto Transit, Inc.*

The imposition on the employer of just such a burden of proving that a "better" way was not available resulted in the reversal by the Sixth Circuit in *Chrisner v. Complete Auto Transit, Inc.*, ____ F.2d ____, No. 78-1337 (6th Cir. March 19, 1981):

> "In other words, the District Judge rejected Complete Auto's business necessity defense solely because he believed that the company had not shown the unavailability of alternative hiring procedures which would have less of an adverse impact on female applicants. This truncated analysis misconstrues the shifting burdens of employment discrimination law. *In disparate impact cases, a Title VII defendant does not bear the burden of showing that its practice or policy embodies the concept of least discriminating alternative.* Complete Auto should not have been compelled to disprove the existence of feasible, alternative methods for hiring yard employees. To the contrary, Ms. Chrisner bears the burden of affirmatively proving the existence of an alternative with a lesser disparate impact. The district court's analysis unjustifiably collapsed the three-step test employed in *Griggs* into a two-step examination in which the defendant, in order to successfully establish a business necessity defense, was burdened with proving to the court's satisfaction that its hiring requirements would have the least disparate impact of all conceivable requirements which satisfactorily measure applicants for employment. By placing too great of a burden on the defendant, this analysis renders the third step of the Title VII inquiry superfluous."

Id. (D-11 (emphasis added, footnote omitted)).[7]

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7 *See also Garcia v. Gloor,* 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied,* ____ U.S. ____, 101 S.Ct. 923 (1981). ("Mr. Garcia and the

(footnote continued)

The Sixth Circuit in *Chrisner* also discusses at length the fundamental absence of difference between the quantum and allocation of burdens of proof required in disparate treatment and disparate impact cases. (D-12-17). It also analyzes the confusion among the circuits on this issue, which it attributes to the use of the word "necessity" in the business necessity defense. (D-12-14).

Bethlehem submits that the conflict between the Second and Sixth Circuits, together with the manifest analytical confusion among the various circuits, is by itself sufficient reason to grant a writ of certiorari in this action.

B. The Court of Appeals' Decision Is Directly Contrary to *Albemarle* and *Dothard*

The conflict of decision between the Second Circuit's decision in this case and the Sixth Circuit's in *Chrisner, supra,* reflects a fundamental failure by the Second Circuit to apply this Court's decisions in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362 (1975), and *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720 (1977). Bethlehem submits that the Court should grant the writ herein in order to ensure uniform application of those decisions of this Court.

In both *Albemarle* and *Dothard* the Court articulated the tripartite burden of proof followed by the Sixth Circuit in *Chrisner.* The tripartite flow is also identical to that set forth in *McDonnell Douglas, Furnco, Sweeney* and *Burdine.*

In *Albemarle* the Court stated squarely for the first time that the questions of (i) "job relatedness," and (ii) the effect of alternative selection methods, were questions presented at

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EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination. Judges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment by imposing a solution that appears less restrictive" [citing *Furnco*]).

separate stages of a Title VII case—and that the defendant bore the former burden while the plaintiff bore the latter:

> "In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' *Id.*, at 432. This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' *Id.*, at 801. Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination. Id., at 804-805." *Albemarle*, 422 U.S. at 425. *See also Dothard*, 433 U.S. at 329.

Albemarle also clearly established that proof of alternative selection procedures was, properly viewed, merely 'evidence' that the employer's method was a pretext and that the burden of proving pretext was squarely on the plaintiff—not, as the Second Circuit held here, on the employer.

> "Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a 'pretext' for discrimination in light of alternative selection procedures available to the Company." 422 U.S. at 436.

The Court of Appeals' attempt to distinguish the burden of proof in disparate impact cases from that in *McDonnell*

Douglas-style treatment cases such as *Furnco* and *Burdine* is particularly misplaced in light of the authority on which this Court based its decisions in *Albemarle* and *Dothard*. In *Albemarle* the Court explicitly relied on *McDonnell Douglas* (a treatment case). 422 U.S. at 425. *Dothard* relied on both *Albemarle* and *McDonnell Douglas*. 433 U.S. at 329.

It is particularly important to note the concurrence by Justice Rehnquist in *Dothard*, where he stated that "once the burden has been placed on the defendant, it is then up to the defendant to articulate the asserted job-related reasons underlying the use of the minima." 433 U.S. at 340 (citing *McDonnell Douglas, Griggs* and *Albemarle*). Justice Rehnquist's opinion for the Court in *Furnco* used precisely the same description of the burden of proof placed upon a defendant as did his concurrence in *Dothard*: that the defendant need only "articulate" a legitimate business reason for the practice in question.

Bethlehem submits that, in light of this Court's consistent allocation of the burden of proof in both treatment and impact cases over the last decade, the Court of Appeals' effort to create an artificial distinction between disparate treatment and disparate impact cases constitutes grave error.

C. "Impact" Cases Are Not Distinguishable From "Treatment" Cases For Burden Of Proof Purposes

Nothing in the words or reasoning of *Furnco, Sweeney* or *Burdine* suggests that the allocation of the burden of proof in disparate impact cases should be greater than in treatment cases. While a *prima facie* case is proved by different forms of evidence in treatment and impact cases, the significance of a *prima facie* case is identical.

Furnco holds that proof of an unexplained failure to hire an apparently qualified applicant merely raises a permissible inference of racial motivation. That inference constitutes the *prima facie* case. *Furnco, supra,* 438 U.S. at 577. Thus, merely proffering an alternative explanation is sufficient to rebut the

rebut the *prima facie* case. *Furnco, supra,* 438 U.S. at 578; *Burdine, supra,* ____ U.S. at ____, 101 S.Ct. at 1094. The burden then shifts back to the plaintiff to prove that the proffered alternative explanation for the employer's conduct was simply a pretext to disguise discriminatory motive.

A *prima facie* case of disparate impact under a *Griggs v. Duke Power Co.* fact pattern is usually made out by statistical analysis which simply permits an inference that any policy which has the demonstrable effect of disadvantaging blacks is discriminatory in nature, much as *McDonnell Douglas* permits an inference of discrimination to be drawn from the mere unexplained failure to hire a particular black. The significance of a *prima facie* case is identical in both types of cases. In each it is the absence of explanation which permits the inference.

In both types of fact patterns, this Court has held that the employer may rebut the inference of discrimination created by a *prima facie* showing by explaining how its employment practice was reasonably related to a legitimate business goal. In a *McDonnell Douglas* fact pattern the employer usually explains one particular hiring decision with respect to its legitimate business goals, while in a *Griggs* fact pattern it explains that its policy (as contrasted to an individual decision) was related to maximizing a legitimate business goal.

In some instances the two fact patterns merge and the employer's explanation which serves to rebut the *prima facie* case would be identical regardless of the label placed on the case. Thus in *Furnco,* which this Court characterized as a *McDonnell Douglas*-type treatment case, the employer's explanation for its conduct was that it had adopted a neutral policy of hiring bricklayers whose work was personally known to the superintendent in order to maximize the efficiency and safety of its operations. It proved that such personal knowledge of the bricklayers' qualifications was reasonably related to its legitimate business goals in assuring the safety and productivity of its projects. Furnco made no attempt to explain the individual hiring decisions but relied instead on its neutral

policy to explain the refusal to hire. That explanation is the sort typically expected in a *Griggs* fact pattern.

It happened that in *Furnco* the proof was that the employer's hiring policy impacted only the litigating individuals. Since plaintiffs had not sought to prove disparate impact on all black bricklayers, the case was treated as a *McDonnell Douglas* case. Had the *Furnco* plaintiffs attempted to prove a *Griggs*-type case, the explanation proffered by the employer would have been identical.

Given the identical nature and effect of the *prima facie* case in both impact and treatment cases, the burden of proof necessary to rebut it should not be any different. Thus, in *Furnco, Sweeney* and *Burdine* the Court has repeatedly held that the employer's burden is only that of coming forward with sufficient evidence to create an issue of fact as to whether its conduct could be explained by legitimate business, not racial, considerations. *See Furnco,* 438 U.S. at 578; *Sweeney,* 439 U.S. at 25 n.2; *Burdine,* ____ U.S. at ____, 101 S.Ct. at 1094, 1096.

Similarly, in *Dothard v. Rawlinson, supra,* and *Albemarle Paper Co. v. Moody, supra,* this Court held that the burden on the employer was merely that of proving that its policies were "job related", not arbitrary. *Albemarle,* an "impact" case, relied on *McDonnell Douglas,* the prototypical "treatment" case, in allocating the burden of proof. 422 U.S. at 425. *Dothard* quoted both *Albemarle* and *McDonnell Douglas.* 433 U.S. at 329.

In *all* of these cases—*Furnco, Sweeney, Burdine, Dothard* and *Albemarle*—the Court then shifted the burden back to the plaintiff to prove that the reasons adduced by the employer were a pretext for discrimination. Proof of such pretext is ultimate proof of discriminatory intent by the employer.

The nature of a plaintiff's proof of pretext will necessarily vary depending upon the nature of the explanation offered by the employer. One way of proving that the adoption of a

policy which had a disparate impact was merely a pretext for discrimination would be for the plaintiff to prove that other selection methods would equally well serve the employer's business goals with less discriminatory effects. Such proof would, however, merely be "*evidence* that the employer was using its [selection method] as a 'pretext' for discrimination". *Albemarle,* 422 U.S. at 425 (emphasis added) (citing *McDonnell Douglas,* 411 U.S. at 802). In all Title VII cases, the ultimate burden of persuasion on the question of discriminatory intent is on the plaintiff. *Burdine,* ____ U.S. at ____, 101 S.Ct. at 1093; *Albemarle,* 422 U.S. at 425.

The Court of Appeals in this case, however, held that the burden on an employer in an impact case is greater than in a treatment case. (A-17). It found that Bethlehem had produced proof that its hiring policy was job related. (A-23). But it speculated that some other method might have resulted in greater black recruitment and that Bethlehem had thereby failed to meet its burden of proof on its business necessity defense. (A-26).

Neither the District Court nor the Court of Appeals found that Bethlehem had adopted its hiring method as a pretext to mask discriminatory intent. Yet the Court of Appeals reached the same practical result by imposing on Bethlehem the burden of rebutting the effectiveness of such hypothetical alternative means and reversing the District Court for Bethlehem's failure to bear that burden.

It effectively collapsed the carefully wrought three step proof pattern set forth in *McDonnell Douglas, Furnco, Sweeney, Burdine, Albemarle* and *Dothard* into a two step process. *See Chrisner* v. *Complete Auto Transit, Inc.* (D-11).

In the process it imposed on Bethlehem the obligation of proving its absence of discriminatory intent. Placing that burden on the employer was explicitly rejected by this Court in *Sweeney,* where it was noted that requiring proof of the absence of discriminatory intent

> "would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring such proof from the employee as a part of the third step." 439 U.S. at 24 n.1.

The Court of Appeals also effectively required Bethlehem to prove that its selection method was not just job related, as required by *Dothard* and *Albemarle,* but was also the one which ensured the consideration of the maximum number of black applications. That requirement was explicitly rejected by this Court in *Furnco* on nearly identical facts. 438 U.S. at 577-78; *Chrisner, supra.* (D-11).

Bethlehem submits that the attempt by the Court of Appeals to drastically limit the holdings of *Furnco, Sweeney, Burdine, Dothard* and *Albemarle* cannot be squared with the reasoning of this Court in those decisions or with the purposes of Title VII. Imposing on the employer the burden of proving that a hiring method is the "best" method among all of those which might hypothetically be available, would result in an impossible burden on the employer in most cases.

Such a burden would effectively mean that a *prima facie* showing of disparate impact would be equivalent to an ultimate finding of discrimination. It would elevate the fragile "presumption" of discrimination which arises from the narrow proof of a *prima facie* case to a virtually irrebuttable presumption at the second (and, under the Court of Appeals' analysis, final) stage of the case. It would shift the ultimate burden of persuasion from the plaintiff to the employer. Bethlehem submits that such a shift of ultimate burden would represent a radical departure from a decade of decisions of this Court which have established a reasonable, orderly pattern of proof in Title VII cases.

II. A DISPARATE IMPACT CASE MAY NOT BE ESTABLISHED BY IGNORING THE LEGITIMATE INCUMBENCY EXPECTATIONS OF REGULAR BETHLEHEM FOREMEN.

Bethlehem submits that this case has been erroneously characterized as a *Griggs*-type disparate impact case. It is nearly identical in its facts to *Furnco*. Its "impact" characterization stems solely from a stilted view of Bethlehem's policies which ignores the seniority of its regular foremen.

The District Court refused to credit respondents' statistical proof of disparate impact because that proof contained the explicit assumption that all 126 positions were equally available to all ironworkers. That assumption ignored uncontroverted proof that 97 of those 126 positions were, in fact, filled by experienced Bethlehem foremen. Of those 97 positions, 83 were filled by a substantially smaller group of regular foremen who had been foremen for the very superintendents who successively reappointed them to the positions in question. The record is similarly uncontroverted that Bethlehem had consciously adopted hiring and retirement policies which were directed at creating supervisory incumbency on its intermittent steel erection projects which approximated normal incumbency in continuous plant operations. That incumbency was critical to safety and efficiency.

It was only by ignoring the reality of the functionally incumbent status of Bethlehem's foremen that respondents and the Court of Appeals were able to conjure up "statistical proof" of disparate impact. The acceptance of such a fiction in this case is analytically identical to positing that every time a steel plant is reopened after one of the industry's episodic extended layoffs all supervisory positions are available to be filled anew by new appointees. No court has ever posited such a possibility. Incumbents are entitled to preference after a layoff and it is only those who do not return whose positions are open for new hires. Such incumbency rights, particularly at

supervisory levels, are universally recognized as essential to management's legitimate interest in safety and efficiency and to the employees' legitimate expectation for job continuity. *See, e.g., International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843 (1977); *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747, 96 S.Ct. 1251 (1976).

While Bethlehem's system was not a formally negotiated seniority system such as that considered in *Teamsters* or *Franks,* it was one calculated to achieve the same goals. The Court of Appeals' donning of such statistical blinders ignores the legitimate expectations of Bethlehem's regular foremen and violates the spirit, if not the letter, of Section 703(h) of Title VII. *See, e.g., Procter & Gamble Manufacturing Co. v. Fisher,* ____ U.S. ____, ____, 101 S.Ct. 929, 929-930 (1981) (Rehnquist, J., dissenting from denial of certiorari).

Shorn of such statistical fiction this case is simply not one which proves disparate impact. It is, rather, one alleging simply discriminatory treatment. The facts alleged and proved are, indeed, nearly identical to those of *Furnco,* which was analyzed by this Court as being a treatment not an impact case. Here respondents individually applied for certain positions and were informed that the positions had already been filled by Bethlehem's regular foremen. In *Furnco,* the employer would not even consider applications of new hires because of its firm practice of hiring only bricklayers with whom its superintendent had prior experience. Bethlehem submits that both cases are treatment cases, and the same burdens of proof should have been applied herein as were applied in *Furnco.*

III. THE INCLUSION OF MANIFESTLY UNQUALIFIED APPRENTICES AND SPECIAL TRAINEES IN THE SUPERVISORY STATISTICAL SAMPLE WAS ERROR.

A. Respondents Failed to Present Competent Statistical Proof

Respondents' statistical presentation in this action posited that since 10% of Bethlehem's work force during the relevant time frame was black or Puerto Rican, 10% of the foremen appointed should have been black or Puerto Rican. Respondents' counsel expressly instructed their expert witness to ignore the fact that a large number of Bethlehem's ironworkers were either in formal apprenticeship programs or in special training programs organized by Bethlehem to accelerate minority participation in the ironworker trade.

That assumption was necessary in order for respondents' expert to be able to satisfy the statistical significance criteria of *Castaneda v. Partida,* 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 1281 n.17 (1977).

The District Court specifically found that on the trial record the inclusion of apprentices and special trainees in the sample was unwarranted and held that respondents had failed to present competent evidence of statistical disparity sufficient to make out a *prima facie* case of disparate impact. (B-6-9). *See Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736 (1977).

The Court of Appeals conceded that this imbalance of qualifications existed. (A-25). It concluded, however, that there must have been some appreciable number of qualified blacks in the work force and that Bethlehem should have been able to find more black foremen than it did. *(Id.)* In spite of the fact that no blacks or Puerto Ricans came forward to be identified as members of the class or as qualified to be foremen, it found that respondents had made out a *prima facie* case of disparate impact despite the admitted lack of competent statistical evidence of such impact.

Bethlehem submits that the Court of Appeals' holding that a *prima facie* case of disparate impact was presented fundamentally misapplies the burden of proof in such a Title VII case. Absent a competent statistical demonstration of disproportionate impact, respondents simply failed to satisfy their burden. *See Procter & Gamble Manufacturing Co. v. Fisher, supra,* ____ U.S. at ____, 101 S.Ct. at 930 (Rehnquist, J., dissenting from denial of certiorari). ("The blind use of statistics, however, cannot be permitted to undermine the policies of Congress or erode our decisions on substantive law.")

B. The Court of Appeals Penalized Bethlehem For Its Voluntary Affirmative Efforts To Increase Minority Participation In the Ironworker Trade

The Court of Appeals' approval of respondents' inclusion of unqualified black and Puerto Rican apprentices and trainees in its statistical analysis perversely penalizes Bethlehem for its affirmative efforts to overcome the unions' history of discrimination. The record is undisputed that Bethlehem had no part in the local union's discrimination which led to the Department of Justice's 1972 injunction barring the union's restrictive membership practices. Neither Bethlehem nor any other contractor is even mentioned in the lengthy and detailed opinion in that action.[8] Indeed the record is replete with evidence of Bethlehem's efforts to obtain the bargaining rights in New York and the consistent rebuff of those efforts by the employers who held those rights.

Having been excluded from any ability to participate in, and hence influence, union membership policy, Bethlehem exercised its influence with the national unions to obtain the right to hire a certain percentage of non-local union ironworkers. It used that right to create special minority training programs for blacks who could not gain admission to local apprenticeship programs. These programs where designed to accelerate black participation in the ironworker trade.

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8 *United States v. Local 638, et al.,* 347 F. Supp. 169 (S.D.N.Y. 1972).

As soon as the Department of Justice's injunction began to take effect by mandating admission of blacks to local apprenticeship programs Bethlehem also hired large numbers of black apprentices.

The large percentage composition of black apprentices and trainees which resulted in Bethlehem's workforce was used by respondents and the Court of Appeals to create a statistical inference that Bethlehem had failed to promote adequate numbers of blacks to supervisory positions. Simply put, the fact that Bethlehem had gone out of its way to develop entry level participation was used by the Court of Appeals to artificially create liability at the supervisory level.

Bethlehem submits that such draconian use of statistical gamesmanship to achieve a particular result is impermissible. Moreover, the ultimate result of such abuse of statistics is counterproductive to the goals of Title VII. The message to employers would be clear—do not rapidly increase entry level and trainee representation or else you will be liable for your failure immediately to mirror that population in the supervisory ranks.

IV. BETHLEHEM WAS NOT REQUIRED TO SOLICIT INDIVIDUAL IRONWORKERS FOR SUPERVISORY APPLICATIONS IN ORDER TO INCREASE MINORITY REPRESENTATION.

Respondents' attempted proof of *prima facie* discrimination under *McDonnell Douglas Corp. v. Green* consisted of proof that on four separate occasions one or more of them applied for foreman positions and failed to obtain such positions. In three of these instances they failed to prove that the positions for which they applied were, in fact, available or later became available. The reason that such positions were not available was that the use of Bethelehm's selection procedure had resulted in all positions being filled prior to their applications.[9]

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9 Bethlehem's practice of preferring, indeed seeking out, such individuals whose qualifications were personally known to the superinten-

(footnote continued)

In *Furnco* this Court held that the employer's proof that the practice of preferring persons of known skill from a superintendent's list to the total exclusion of unknown applicants was reasonably related to efficiency of production was sufficient proof to rebut plaintiffs' *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green.* Thus the Court held that

> "it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications." *Furnco,* 438 U.S. at 577. *Accord, Burdine,* ____ U.S. at ____, 101 S.Ct. at 1096-97.

Contrary to *Furnco* the Court of Appeals in this case held specifically that

> "[t]he district court stated that 'if Bethlehem had taken affirmative steps to find qualified blacks, one or more additional black foremen would have been appointed,' but concluded that Bethlehem's failure to take such steps could not be illegal, given the basic logic of *Furnco.* Contrary to the district court's conclusion, *we believe that the failure to solicit qualified blacks as foremen constitutes a form of unacceptable discrimination in this case* . . ." 635 F.2d at 1017. (A-21). (emphasis added).

The Court of Appeals' decision to reverse for Bethlehem's failure to make such an effort is directly contrary to the holding of *Furnco.*

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dents was remarkably similar to that employed by the superintendent in *Furnco.* Bethlehem's method was, if anything, more open. In *Furnco* the superintendent would not even accept applications and hired exclusively from his list of experienced personnel. Moreover, the jobs at issue in *Furnco* were non-supervisory.

Conclusion

For all of the reasons set forth herein Bethlehem submits that the Court should grant a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WAYNE A. CROSS
45 Rockefeller Plaza
New York, New York 10111
(212) 841-5700

Attorney for Petitioners

CURTIS H. BARNETTE
KATHLEEN M. MILLS
ROBERT L. SILLS
WILLIAM I. SUSSMAN,

Of Counsel.

April 17, 1981

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980)

[1007] UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 824—September Term, 1979

(Argued April 2, 1980 Decided November 26, 1980)

Docket No. 79-7225

ROYSWORTH D. GRANT and WILLIE C. ELLIS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

and

LOUIS MARTINEZ,

Plaintiff-Intervenor-Appellant,

—v.—

BETHLEHEM STEEL CORPORATION, JAMES DEAVER, EUGENE R. DRIGGERS, and THOMAS C. CONNOLLY, individually and as agents of Bethlehem Steel Corporation, et al.,

Defendants-Appellees.

Plaintiffs, two black and one dark-skinned Puerto Rican iron workers, brought class action against employer and three of its supervisory employees alleging that it [1008] had discriminated against blacks and Hispanics in its selection of iron

worker foreman, thereby violating Title VII of the Civil Rights Act of 1964. The United States District Court for the Southern District of New York, Whitman Knapp, J., dismissed the complaint, and plaintiffs appealed. The Court of Appeals, Mansfield, Circuit Judge, held that plaintiffs made out a prima facie case of both discriminatory treatment and discriminatory impact from a facially neutral selection procedure.

Reversed and remanded.

1. Civil Rights

Discriminatory or disparate treatment in violation of Title VII of the Civil Rights Act of 1964 occurs where employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights

Proof of discriminatory motive is critical in a case of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964, although it can in some situations be inferred from mere fact of differences of treatment; on the other hand, disparate impact such as violates Title VII result from use of employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity, and proof of motive is not required to sustain a claim of disparate impact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights

In order to make out a prima facie case of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964, plaintiff must ordinarily prove that he belongs to a racial minority, that he applied and was qualified for a job for which

employer was seeking applicants, that, despite his qualifications, he was rejected, and that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications; such requirements, however, do not represent exclusive method of showing disparate treatment under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights

An employer-union agreement permitting employer to discriminate is no defense to an action brought under Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights

Where, in action for disparate treatment brought under Title VII of the Civil Rights Act of 1964, employer comes forward with evidence of a legitimate reason for such disparate treatment, complainant must then be afforded opportunity, by way of rebuttal, to demonstrate by competent evidence that presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision; if plaintiff shows that employer's stated reason for rejecting him was a pretext, such as where the reason was not used to reject white applicants, employer's reason will not stand. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights

Against inference of discrimination that may be drawn from disparate impact attributable to an employment practice, employer may defend by showing a business necessity for the practice, i.e., that it is not based on race but on a genuine business need and has a manifest relationship to employment in question or a demonstrable relationship to successful performance of jobs for which the practice was used; employer's burden of proving job-relatedness to rebut a claim of disparate

impact is greater than its burden of merely showing a legitimate, nondiscriminatory reason in response to a claim of discriminatory treatment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[1009]

7. Civil Rights

Should employer adduce evidence of business necessity in defense of inference of discrimination that may be drawn from disparate impact attributable to an employment practice, plaintiff must then be given an opportunity to show that other selection devices without a similar discriminatory effect would also serve employer's legitimate interest in efficient and trustworthy workmanship. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights

A victim of a discriminatory practice need not always show that his application was rejected in order to recover; where a discriminatory practice is established, nonapplicant may, in lieu of an application, show that he was within class of victims who were subject of unlawful discrimination and that an application would be fruitless, since it would be denied. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights

Subjective word-of-mouth hiring methods, although suspect because of their propensity for masking racial bias, may be upheld despite apparent favoritism of whites over blacks sufficient to constitute a prima facie case under Title VII of the Civil Rights Act of 1964, but only where they are necessary to insure that safest and most competent workmen are hired. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights

Plaintiffs, two black and one dark-skinned Puerto Rican iron workers who were qualified for but denied positions as foreman with employer, made out a strong prima facie case of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964 resulting from employer's subjective "word-of-mouth" hiring methods which failed to solicit qualified blacks as foremen even though whites were being solicited at the same time; faced with an admittedly entrenched discriminatory system that had historically shown no inclination to make blacks foremen, plaintiffs were not required to continue reapplying for such positions in order to maintain their actions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Civil Rights

Union pressure on an employer does not relieve latter of his obligation to respect an applicant's right under Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Civil Rights

Plaintiffs, two black and one dark-skinned Puerto Rican iron workers who were qualified for but denied positions as foremen, made out a prima facie case of discriminatory impact under Title VII of the Civil Rights Act of 1964 in light of undisputed statistics pointing strongly toward discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

13. Civil Rights

A prima facie case of discrimination under Title VII of the Civil Rights Act of 1964 may be made by showing that blacks are concentrated in lower paying, less desirable jobs and were therefore discriminated against with respect to promotions and

transfers. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

RICHARD A. LEVY, New York City (Lewis M. Steel, Eisner, Levy, Steel & Bellman, P.C., New York City, of counsel), *for plaintiffs-appellants.*

WAYNE CROSS, New York City (Ralph L. McAfee, Cravath, Swaine & Moore; Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City, of counsel), *for defendants-appellees.*

MICHAEL D. RATNER, New York City, *for plaintiff-intervenor-appellant.*

JOHN S. MARTIN, JR., U.S. Atty., for the Southern District of New York, New York City (Barbara L. Schulman, Dennison Young, Jr., Asst. U.S. Attys., New York **[1010]** City, Drew S. Days, III, Asst. Atty. Gen., Civ. Rights Div., U. S. Dept. of Justice, Washington, D. C., of counsel), *for amicus curiae United States.*

LEROY D. CLARK, Gen. Counsel, Equal Employment Opportunity Commission, Washington, D. C., *for amicus curiae Equal Employment Opportunity Commission.*

MCGUINESS & WILLIAMS, Washington, D. C. (Robert E. Williams, Douglas S. McDowell, Edward E. Potter, Washington, D. C., of counsel), *for amicus curiae Equal Employment Advisory Council.*

Before:

LUMBARD, MANSFIELD and KEARSE,
Circuit Judges.

MANSFIELD, *Circuit Judge:*

Appellants, two black and one dark-skinned Puerto Rican ironworkers, brought this class action against Bethlehem Steel Corporation and three of its supervisory employees in the District Court for the Southern District of New York, alleging that it had discriminated against blacks and Hispanics in its selection of ironwork foremen, thereby violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, 42 U.S.C. § 1981 and Executive Order 11246, and as a remedy sought backpay. After a bench trial Judge Whitman Knapp on December 27, 1978, entered a Memorandum and Order dismissing the complaint. We reverse and remand for further proceedings. Contrary to the conclusions reached by the district court, appellants made out a prima facie case of both discriminatory treatment, see *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972), and discriminatory impact from a facially neutral selection procedure, see *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1970); *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977).

Bethlehem Steel Corporation's Fabricating Steel Construction Division (Bethlehem), until it ceased operations in March 1976, was engaged in construction of steel framework for bridges, skyscrapers, hospitals, air terminals and other structures. For this work, which is hazardous, it employed ironworkers who performed jobs ranging from such unskilled tasks as carrying planks to be laid down for flooring, to the more skilled operations of welding or bolting up steel structures. The ironworkers worked together in groups or "gangs" of three to six, each under the leadership of a foreman or

"pusher." No special education or training was required for the job of ironworker. To become a foreman, however, an ironworker, because of the dangerous nature of the work, should possess safety consciousness, leadership qualities and productiveness.

As the district court found, "[p]rior to the enactment of Title VII there had been a long history of discrimination against blacks in the hiring of ironworkers in the New York Metropolitan area." In the late 1960's, as a result of a building boom which led to a shortage of ironworkers, and a certain amount of community pressure, blacks were admitted into the ironworker trade, working on permits issued by the union. Until 1970, however, blacks were underrepresented in the trade. During the period from 1970 to 1975, which is a crucial time-frame for purposes of this appeal, blacks filled approximately 10% of the 1,018 ironworker jobs on 10 representative Bethlehem projects.[1] During this same period approximately 126 ironworkers, of whom 97 had had prior experience as Bethlehem foremen, were appointed foremen on the 10 projects. Of these only one was black (Nolan Herrera).

The method used for selection of foremen on Bethlehem's steel projects was at best rather haphazard. On each steel construction project Bethlehem employed a project superintendent who chose the foreman for **[1011]** the project. The superintendents, all of whom were white, were given uncontrolled discretion to hire whom they pleased. As the district court found, "It is not disputed that the superintendents hired by word of mouth on the basis of wholly subjective criteria." No foremen's jobs were posted and no list of eligible foremen was kept. Instead, upon hearing informally of an upcoming Bethlehem project, of which the superintendent would learn as much as eight months to a year in advance, he would communicate with persons whom he knew in the trade or who were recommended to him by others and line them up as prospective

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1 During the period from 1973 to 1976, 11.8% of Bethlehem's ironworker force was black or Puerto Rican.

foremen for the project. Under this practice of pre-job hiring those interested in the job of foreman would rarely have the chance to apply for the job on any given project, since only persons solicited by the superintendent would know of the project in advance. By the time the project became known generally and notice of it was posted in the union hiring hall, there would usually no longer be any openings available for the job of foreman.

By the early 1970's the three appellants had all had extensive ironworker experience. Martinez, a 53-year-old dark-skinned Puerto Rican, started as a permit-man, became a union member in 1969 and had worked as foreman on projects for other companies. In 1969 he became a foreman on a large Bethlehem project (Astor Plaza), where he earned an excellent reputation, despite which he was never again chosen as a foreman. Grant, a 51-year-old black, had been an ironworker since age 14, had mastered almost every aspect of the trade, had served as a supervisor on many jobs in Trinidad, and had worked on many structural steel jobs in New York, including the World Trade Center and the Celanese Corporation building. For 10 years he had worked as an ironworker for Bethlehem. Ellis, a black American in his 40's, likewise had wide ironwork experience, engaging in such skilled operations as bolting, fabricating and welding. He had served as a foreman for Harris Structural Steel Corporation and Koch Construction Company before going to work for Bethlehem.

Despite their qualifications and their repeated requests to Bethlehem for assignment to the position of foreman, none of the appellants was ever appointed to that job. Their efforts were frustrated principally by two Bethlehem project superintendents, James Deaver and Eugene Driggers, who were responsible for hiring most foremen on 10 representative Bethlehem projects in the New York Metropolitan area. Deaver, who was a superintendent on many Bethlehem projects for 14 years prior to 1976, never appointed a black or Puerto Rican. His practice was to appoint white foremen by word of mouth from among friends and those recommended by other foremen,

union officials or superintendents. His attitude toward appointment of blacks as foremen was summarized by Judge Knapp, "There is no question in my mind . . . that a black man had a much higher threshold of acceptability than a caucasian in Mr. Deaver's mind." Similarly Driggers, who had been a Bethlehem superintendent for many years on some 35 projects, 90% of which were in the New York Metropolitan area, had never appointed a black or Puerto Rican. He likewise appointed white foremen by word of mouth from among friends or persons known to him or those referred to him by others. Although he conceded that some minority ironworkers, including Martinez, had performed satisfactorily and were capable of being foreman, he excused his failure to make appointments of blacks or Puerto Ricans on the grounds that he "didn't know any" and that "nobody [had] ever worked with me to become one." Neither Deaver nor Driggers ever kept any list of ironworkers qualified to become foreman.

Superintendents Deaver and Driggers defended their subjective hiring practices by pointing to the dangerousness of ironwork and asserting that no objective method of evaluation would have let them effectively determine individuals' competence to handle the heavy responsibility of foremanship. In selecting foremen they tended to call back men who had worked before as Bethlehem foremen; since ironwork is project-**[1012]** oriented, with laborers and foremen from a completed project returning to the same pool until opportunities at a new project became available, superintendents frequently had ready access to experienced Bethlehem foremen from within the ironworkers' ranks. Of the 126 foreman positions at issue here, 97 went to men who had worked as foremen on previous Bethlehem projects. Several of the remaining hirees had worked as foremen for other ironwork companies. Others had served as ironworkers at Bethlehem before becoming foremen.

Appellants attack the superintendents' word-of-mouth hiring system as discriminatory in both treatment and impact. They assert that friendship and nepotism rather than assess-

ment of ability formed the basis for the superintendents' selections, and that since blacks tended to be excluded from the all-white superintendents' friendship, they were also unlawfully excluded from jobs as foremen. In support of these allegations, appellants point out that the supervisors often went to considerable length to solicit people whom they knew for foreman positions, sometimes calling them on the phone or personally going to ask them to work. One superintendent, Driggers, hired his two sons as foremen, notwithstanding that they had less ironwork experience than the three named plaintiffs and had not served as foremen before. On another occasion, Superintendent Deaver hired a foreman whom he knew had a drinking problem. One member of the gang which this man supervised suffered a fatal accident because he was not following safety regulations. Similarly, Deaver rehired a foreman who had lost a gang member on his last project when a column for which he was responsible fell; the same foreman lost a derrick on the new project, and left work with a nervous breakdown. Appellants urge that concern for workers' safety could not have been the primary motive behind these hirings.

Appellants further assert that the subjective word-of-mouth hiring was unnecessary. They observed that Bethlehem recognized the feasibility of an objective system for hiring of foremen when, in bidding on government contracts, it represented that it would conform to the Equal Employment Opportunity Commission's hiring guidelines, incorporating into these contracts a manual called "A Guide to Equal Employment Opportunity," which Bethlehem Steel had prepared and published for the guidance of its hiring authorities. That manual mandated selection by merit and assurance that qualified minority employees in each unit would have a full opportunity to hear about and compete for available jobs. It required that (1) a job analysis be made to determine the qualifications for each supervisory position, (2) a list of employees in each unit be maintained with each employee's race and position identified, and (3) job notices be posted at each operation and a current list of available vacancies be kept.

Although there is evidence that Bethlehem incorporated the Guide selectively in certain contracts, it is unclear whether it actually complied with its requirements in its performance of those contracts.

The district court held that plaintiffs had failed to make out a prima facie case of either discriminatory impact or discriminatory treatment. It took the view that foremen must necessarily be hired according to the superintendents' subjective evaluations of their ability to promote safety and productive work, since there were no readily identifiable objective criteria for determining who would be capable of undertaking such a responsibility. Judge Knapp declined to hold that either Deaver or Driggers had intentionally discriminated against any of the appellants.

The district court also rejected plaintiffs' statistical evidence of discriminatory impact attributed to defendants' hiring practices, which was based on Bethlehem's hiring of only one black in its recruitment of some 126 foremen during the period 1970-75. He held that the underlying assumption, that the percentage of black ironworkers qualified to become foremen was the same as that of whites, was erroneous because blacks had been substantially excluded from the ironwork trade during the 1960's with the result that the percentage of whites **[1013]** who were experienced and qualified to become foremen was greater than the percentage of blacks. He also held that when presenting their statistical case plaintiffs should not have considered foreman positions that had been offered to men with previous experience as Bethlehem foremen. Such rehiring, he believed, constituted a legitimate neutral business practice, considering the importance of experience as a factor for protection of laborers' safety. Therefore, in his view, the relevant statistic was not one black in 126 foreman selections, but one black in 29 selections of foremen without prior Bethlehem foreman experience. He held that this statistic did not establish a prima facie case, since the hiring of only one more black would have significantly changed the balance in such a small sample.

Having rejected plaintiffs' statistical proof of discriminatory impact resulting from a facially neutral hiring practice, Judge Knapp concluded that plaintiffs had also failed to make out a case of discriminatory treatment under the formula laid down in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and repeated many times thereafter, see *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). He found two central difficulties with this portion of their case. First, since plaintiffs had not adduced the testimony of any blacks other than themselves who had applied for foreman jobs and been passed over in favor of whites, he refused to infer from the depositions of Deaver and Driggers that other blacks besides the plaintiffs had been passed over after applying. Second, he found that the three named plaintiffs had failed to establish all of the elements of a prima facie case of discriminatory treatment as described in *McDonnell Douglas v. Green, supra,* where the Supreme Court held that in order to establish a prima facie case a plaintiff must prove

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Judge Knapp asserted that, since plaintiffs' applications were almost all made after the superintendents had already hired a full complement of foremen for the projects on which they wished to work, plaintiffs had failed to show that they had applied for a job for which Bethlehem was seeking applicants, or that it had continued to seek applicants after rejecting them.

With respect to one instance where Driggers had hired a foreman after one of the plaintiffs had applied for the same job, Judge Knapp stated that he did not believe that Driggers

remembered the prior application when hiring the new man. Though Judge Knapp admitted that "if Bethlehem's heart had been in the right place they might have thought of Martinez and sought him out in order to make him a foreman," he declined to find any legal mandate for Bethlehem to do so. Relying on *Furnco Construction Co. v. Waters, supra,* he stated: "Title VII does not obligate an employer to maximize the employment of blacks, but allows a finding of liability only upon a showing that its practices discriminated against them."

DISCUSSION

Appellants contend that the district court committed various errors in holding that they had failed to make out a prima facie case of discriminatory treatment and discriminatory impact under Title VII of the 1964 Civil Rights Act. Consideration of their claims requires a brief review of governing principles.

[1, 2] As the Supreme Court pointed out in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977), discriminatory or disparate treatment in violation of Title VII occurs where **[1014]** "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." "Disparate impact," on the other hand, results from the use of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.,* 431 U.S. at 336 n.15, 97 S.Ct. at 1854 n.15. Proof of motive is not required to sustain a claim of disparate impact.

[3] In order to make out a prima facie case of discriminatory treatment a plaintiff must ordinarily meet the four requirements established by the Court in *McDonnell Douglas,* which are set forth above. Such conduct "raises an inference of discrimination only because we presume these acts, if otherwise

unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters v. United States, supra,* at 358, n.44 [97 S.Ct. at 1866]." *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 577, 98 S.Ct. at 2949. The four *McDonnell Douglas* requirements, however, do not represent the exclusive method of showing disparate treatment under Title VII. They are "not necessarily applicable in every respect to differing factual situations," *McDonnell Douglas Corp. v. Green,* 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13. As the Court pointed out in *Teamsters v. United States, supra,* 431 U.S. at 358, 97 S.Ct. at 1866:

> "The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. . . . The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."

Since "[t]he method suggested in *McDonnell Douglas* is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination," *Furnco Construction Co. v. Waters, supra,* 438 U.S. at 577, 98 S.Ct. at 2949, a court need not adhere stubbornly to that case's specific formulae when common sense dictates the same result on the basis of alternative formulae. See *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir. 1979).

[4, 5] Once a plaintiff has made out a prima facie case of disparate treatment, the burden shifts to the employer to go forward with evidence of "some legitimate, nondiscriminatory reason for the employee's rejection," *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 801, 93 S.Ct. at 1823; see *Board of Trustees v. Sweeney,* 439 U.S. 24, 99 S.Ct. 295, 58

L.Ed.2d 216 (1978). An employer-union agreement permitting the employer to discriminate is no defense. "Rights established under Title VII . . . are 'not rights which can be bargained away—either by a union, by an employer, or by both acting in concert,' " *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 447 (D.C.Cir.1976), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1977) (quoting from *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. denied,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971)). Where the employer comes forward with evidence of a legitimate reason, the complainant must then be afforded the opportunity, by way of rebuttal,

> "to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas, supra,* at 805, 93 S.Ct. at 1825.

If the plaintiff shows that the employer's stated reason for rejecting him was a pretext, such as where the reason was not used to reject white applicants, the employer's **[1015]** reason will not stand. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978).

A prima facie case of discriminatory impact may be established by showing that an employer's facially neutral practice has a disparate impact on the plaintiff's racial group.

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory emloyment practices." *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1970).

Such a discriminatory racial impact is frequently evidenced by statistics demonstrating that the employer's selection methods or employment criteria result in employment of a disproportionately larger share of whites than of blacks out of a pool of qualified candidates. *Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15, 339, 97 S.Ct. 1843, 1854 n.15, 1856, 52 L.Ed.2d 396 (1977); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).

[6] Against the inference of discrimination that may be drawn from disparate impact attributable to an employment practice, the employer may defend by showing a "business necessity" for the practice, i.e., that it is not based on race but on a "genuine business need" and has "a manifest relationship to the employment in question," or "a demonstrable relationship to successful performance of the jobs for which [the practice is] used," *Griggs v. Duke Power Co., supra,* 401 U.S. 424 at 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158. The employer's burden of proving job-relatedness to rebut a claim of disparate impact is greater than its burden of merely showing a legitimate, nondiscriminatory reason in response to a claim of discriminatory treatment. The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation. Despite evidence of some weaknesses in the statistics, where they disclose a glaring absence of minority representation in the jobs at issue, the burden on the employer increases since "fine tuning" of the statistics will not rebut an inference of discrimination derived "not from a misuse of statistics but from 'the inexorable zero.' " *Teamsters v. United States, supra,* 431 U.S. at 342 n.23, 97 S.Ct. at 1858 n.23.

[7] Should the employer adduce evidence of business necessity the plaintiff must then be given an opportunity to show "that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45

L.Ed.2d 280 (1975) (quoting from *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792, 801, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668); see also *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977). "If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued," *United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2d Cir. 1971); *Parson v. Kaiser Aluminum & Chemical Corp.,* 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied,* 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979).

If a plaintiff succeeds in establishing the defendant's liability, the question of who is entitled to relief then arises. This question is easily resolved when named plaintiffs prove that they have been treated discriminatorily; each plaintiff who can prove individual discriminatory treatment is entitled to relief. The question becomes more complicated, however, when a class of plaintiffs prove that they were subject to a statutorily proscribed "pattern or practice" of discrimination, see 42 U.S.C. § 2000e-6(a), or **[1016]** some other form of improper practices resulting in disparate impact. In *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 97 S.Ct. 1251, 47 L.Ed.2d 444 (1975), the Supreme Court held that proof of a discriminatory pattern and practice may justify a reasonable inference that each individual hiring decision was made in pursuit of the discriminatory policy, and thereby placed upon the employer the burden to come forward with evidence dispelling that inference, stating:

> "[P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Id.* at 772, 96 S.Ct. at 1267.

See *Teamsters v. United States, supra,* 431 U.S. at 359, 97 S.Ct. at 1866.

[8] Moreover, a victim of a discriminatory practice need not always show that his application was rejected in order to recover.

> "Measured against these standards the company's assertion that a person who has not actually applied for a job can *never* be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." *Teamsters v. United States, supra,* 431 U.S. at 365, 97 S.Ct. at 1869.

Denial of relief under Title VII on the ground that the claimant did not formally apply for the job sometimes "could exclude from the Act's coverage the victims of the most entrenched forms of discrimination," *id.,* at 367, 97 S.Ct. at 1870. Where a discriminatory practice is established, the nonapplicant may, in lieu of an application, show that he was within the class of victims who were the subject of unlawful discrimination and that an application would be fruitless, since it would be denied. The law does not require him to do a useless act in order to recover.

[9] Applying these principles to the present case, we recognize that subjective word-of-mouth hiring methods, although suspect because of their propensity for "masking racial bias," *Barnett v. W.T. Grant Co.,* 518 F.2d 543, 550 (4th Cir. 1975), may be upheld despite apparent favoritism of whites over blacks sufficient to constitute a prima facie case, but only where they are necessary to insure that the safest and most competent workmen are hired. *Furnco Construction Corp. v. Waters, supra.*

[10, 11] At the outset, we find insufficient the district court's grounds for holding that plaintiffs failed to make out a

prima facie *McDonnell Douglas* case of discriminatory treatment. Each of the appellants were concededly qualified to serve as a foreman (except that Grant could not supervise a "raising" gang). Each unquestionably applied for the position of foreman and was rejected or deferred. The main source of contention is whether they applied for jobs that were available. Examination of the defendants' claims in this respect leads us to conclude that the jobs must be viewed as having been open.

With respect to Ellis' application to Superintendent Pistillo for a job as foreman at the Columbia-Presbyterian Hospital construction, which was then open, the court held that the Superintendent was justified in giving the job to another because "he was motivated by a desire to keep peace with the union" rather than by racial considerations. However, union pressure on an employer does not relieve the latter of its obligation to respect an applicant's Title VII rights, see *Laffey v. Northwest Airlines, supra.*

Similarly the rejection by Superintendents Deaver and Driggers of applications by all three appellants for foremen's jobs was excused on the ground that the superintendents already had filled the foremen's vacancies for the projects in question and had no current openings available. In addi**[1017]**tion, the appointment of a white ironworker (Del Duca), who was less qualified than appellants, to a welding foreman's position on a job where Grant was then employed, was justified on the ground that five months had elapsed since appellants had applied and Driggers could not be expected to remember the applications. These lame excuses, in view of other undisputed circumstances, are inadequate to establish that jobs were not available for the plaintiffs. The record is replete with examples of the superintendents' efforts to hire whites who had never applied to be foremen. Rejection of appellants' claims because they failed to apply often enough or at correct times makes little sense here, in view of the supervisors' admitted practice of hiring foremen before openings formally became available and were announced, which rendered futile the making of applications for foremen's jobs on specific projects. Each of

the three named appellants clearly and repeatedly made his interest in a job as foreman known to at least one of the superintendents. This was sufficient to put the superintendents on notice that these men wanted a foreman's job. Under Title VII "a nonapplicant can be a victim of unlawful discrimination . . . when an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him." *Int'l Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 367, 97 S.Ct. at 1870; *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Faced with an admittedly entrenched discriminatory system that had historically shown no inclination to make blacks foremen, appellants were not required to keep beating their heads against the wall by reapplying.

The Supreme Court's holding in *Furnco Construction Co. v. Waters, supra,* does not dictate a different result. There the Court held that employers had a responsibility only to offer blacks the same employment opportunities as whites, not to solicit blacks or otherwise devise hiring methods that would maximize black employment. Here blacks were not offered the same employment opportunities as whites. The district court stated that "if Bethlehem had taken affirmative steps to find qualified blacks, one or more additional black foremen would have been appointed," but concluded that Bethlehem's failure to take such steps could not be illegal, given the logic of *Furnco.* Contrary to the district court's conclusion, we believe that the failure to solicit qualified blacks as foremen constitutes a form of unacceptable discrimination in this case, since whites were here being solicited at the same time, even though the whites made no applications for the foreman's jobs for which they were hired.

The failure of Deaver, Driggers or any other Bethlehem superintendent to give a foreman's job to any of the appellants must also be viewed against (1) Bethlehem's "long history of discrimination against blacks in the hiring of ironworkers in the New York metropolitan area," (2) Judge Knapp's statement that in Mr. Deaver's mind "a black man had a much higher threshold of acceptability than a caucasian," and (3) the fact

that although there were 102 blacks in Bethelehem's ironworker force at the time when 126 foremen were selected (almost entirely by Deaver and Driggers), only one black (Herrera) was chosen as a foreman and then only after community pressure. Under these circumstances we must conclude that appellants below made out a strong prima facie case of discriminatory treatment in violation of Title VII. To the extent that Judge Knapp's findings of fact are contrary to this opinion, we hold that they are clearly erroneous. *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979).

[12] Nor can we accept the district court's conclusion that appellants failed to make out a prima facie case of discriminatory impact under Title VII. The undisputed statistics point strongly toward discrimination. After a "long history of discrimination against blacks in the hiring of ironworkers" Bethlehem during the 1970-75 period employed 1,018 ironworkers, of whom 102 were black or Puerto Rican. During the same period it appointed 126 whites as foremen and only 1 black. Aside from the **[1018]** three appellants, who were qualified for foremen's jobs, Superintendents Deaver and Driggers testified at trial that they had supervised blacks whom they considered sufficiently competent to be foremen. Yet the district court rejected appellants' statistical case on the ground that foremen's positions filled with whites who had had prior experience as Bethlehem foremen (some 97) should not be counted but indeed should be deducted from the 126 foremen appointed in calculating available foremen's jobs, leaving only 29 openings for persons with no prior experience as Bethlehem foremen. We believe this was error.

This ruling violates the principle stated by the Supreme Court in *Griggs, supra,* 401 U.S. at 430, 91 S.Ct. at 853, that "[u]nder [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Here, it is indisputable that allowance of hiring based solely on foreman experience

would have operated to freeze the effects of past discriminatory hiring practices. In 1972, Judge Gurfein found that unions involved in the metropolitan New York structural steel industry had illegally discriminated against blacks, and ordered them to increase their non-white membership immediately. *United States v. Local 638 . . . and Local 40,* 347 F.Supp. 169, 182 (S.D.N.Y. 1972). Many of the men whom the superintendents hired as foremen were first hired as foremen from the union during the 1960's, when blacks were effectively excluded from competing with them for these positions, and when the entire industry was rife with entrenched discrimination, see *United Steelworkers of America v. Weber,* 443 U.S. 193, 198 n.1, 99 S.Ct. 2721, 2725 n.1, 61 L.Ed.2d 480 (1979). By treating as unassailable these whites' right to rehiring ahead of any black without foreman experience, the district court's narrowing of appellants' statistical case would allow Bethlehem to perpetuate impermissibly the results of its earlier discrimination.

[13] Moreover, the district court's ruling runs counter to the principle that a prima facie case may be made by showing that blacks are concentrated in the "lower paying, less desirable jobs . . . and were therefore discriminated against with respect to promotions and transfers." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 329, 337-38, 97 S.Ct. 1843, 1851, 1855, 52 L.Ed.2d 396 (1977). To the extent that Bethlehem superintendents may have been justified in selecting foremen from the ranks of Bethlehem employees having experience in that job, this represents a defense based on business necessity, not a basis for eliminating such employees from a statistical comparison used to make out a prima facie case.

Prior foreman experience is a factor properly considered in weighing the defense of business necessity. But without an inquiry into the nature and extent of the experience insofar as it may indicate superior competence on the part of the ironworkers, it cannot be categorized as a *sine qua non* for appointment as foremen. An incompetent foreman should not be repeatedly hired over a qualified ironworker without fore-

man experience merely because the former had the good fortune to have been hired once as a foreman. Here, appellants produced creditable evidence that the superintendents selected some foremen on the basis of friendship without knowledge of or inquiry into their prior safety history. Some of these foremen, as noted above, possessed bad safety records that would have excluded them from rehiring in a strictly merit-based hiring system. No business necessity dictated that these men be rehired without superintendents' assuming any responsibility to consider qualified blacks for the job.

The record, moreover, shows that fully 50% of the foremen hired on the 10 sample projects had worked for Bethlehem less than a year before being made foremen. Each of the named plaintiffs, who were qualified to be foremen, had longer Bethlehem tenure. Many of these other foremen did not have the extensive experience gained by appellants as ironworkers and **[1019]** foremen in outstanding companies other than Bethlehem. Appellants adduced evidence that Bethlehem supervisors hired their sons, friends, and persons whom they trusted, often despite these men's relatively slight experience as Bethlehem ironworkers, even though persons with Bethlehem foreman experience (including appellant Martinez) were available for the job. Given this fact, we cannot accept the view that the positions for which prior foremen were hired should have been excluded as part of appellants' statistical case on the ground that safety dictated as a matter of business necessity that experienced foremen be rehired. Appellees cannot in one breath maintain that these positions should not be considered as part of appellants' statistical case because the rehiring of experienced foremen is so fundamentally necessary, and in the next breath assert that they acted reasonably in hiring friends and relatives with comparatively little experience ahead of experienced foremen like Martinez, on the basis of subjective judgments of the new candidates' competence. If these positions were open to qualified whites without foreman experience, they should also have been open to qualified blacks.

Appellees' second objection to appellants' statistical case, which was accepted by Judge Knapp, is that it was incorrect to view the entire Bethlehem ironworker force as the pool of qualified candidates for foreman positions. The presence of 10% blacks in the ironworkers' labor force, the argument goes, does not suggest that 10% participation in the foreman ranks should follow. Before 1972 there were few minority workers in the union, and most blacks who belonged to the union had been members a relatively short time. Those blacks who belonged to the workforce during the early 1970's took up a comparatively larger segment of the apprentice and trainee pools. The legacy of admitted past discrimination gave blacks less average experience per man than whites. The ratio of qualified blacks to qualified whites in the workforce, appellees conclude, was therefore substantially smaller than the overall percentage of blacks in the workforce.

This background, though partially true, does not justify the assumption that there were *no* appreciable blacks in the workforce with the ability to be good foremen. Though the union had few black members in the early 1970's, many black "permit" workers were working on iron work projects during that period, and some even earlier. See *United States v. Local 638 . . . and Local 40, supra,*[2] Some black workers, including the three named plaintiffs, had more experience at Bethlehem and elsewhere than at least several of the whites hired as foremen. Moreover, as all parties have recognized, experience is only one of several factors to be considered when selecting foremen. It defies common sense to suggest that only one black was sufficiently experienced and competent to merit selection

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2 Ironworkers did not have to belong to unions. They could obtain permits to work on specific projects, and were allowed access to union halls to determine what jobs were available. Martinez, for example, was a permit worker before joining the union. These permit workers of course did not enjoy the coveted privileges of union membership. Judge Gurfein's opinion in *United States v. Local 638 . . . and Local 40, supra,* recognized that blacks belonged to the ranks of permit workers in significant numbers, but found that the union was discriminating against blacks in its selection of full-fledged members.

as a foreman during this period when 126 foreman jobs were filled. It would not have created any substantial difficulty for supervisors to maintain a pool of "eligibles" to be notified of foreman openings, from whom they would choose the foremen for new projects. Such a pool would undoubtedly have contained some qualified blacks. Along these lines Bethlehem incorporated its self-generated "Guide to Equal Employment Opportunity" in contracts for federally funded projects, thus demonstrating its belief that a non-discriminatory hiring procedure other than by the subjective word-of-mouth method was feasible. Had it followed the Guide in practice, an equal opportunity would have been afforded to blacks and Puerto Ricans to become foremen. It could just as easily have given adequate opportunity to blacks in its privately funded projects.

[1020] For all of these reasons we hold that appellants have made out a prima facie case of not only discriminatory treatment but discriminatory impact as well. We remand the case to permit appellees to introduce additional evidence that their discriminatory conduct may have been justified by business necessity, and for any rebuttal testimony by the plaintiffs. As the evidence thus far introduced is insufficient to meet the burden on the defendants, if no additional defensive evidence is offered the sole remaining issue would be backpay damages.[3]

The order is reversed and the case remanded for further proceedings consistent with the foregoing.

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3 We do not view our decision in *EEOC v. Enterprise Assn. Steamfitters,* 542 F.2d 579, 588 (2d Cir.), *cert. denied,* 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1976), as barring an award of backpay damages to ironworkers who (unlike the named appellants) did not apply for positions as foremen. However, they would first be required to prove that they were fully qualified to be foremen, and that they failed to apply because it would have been futile to do so. The situation confronted in *Enterprise Assn. Steamfitters* is clearly distinguishable, involving the speculative hypothesis that wholly unqualified applicants for a union apprenticeship program *might* have passed a non-discriminatory test for admission, *might* have progressed satisfactorily through a three to four year program to graduation, and *might* then have succeeded in obtaining employment as steamfitters. No such situation exists here, where even Superintendents Deaver and Driggers testified that some minority ironworkers under their supervision had performed satisfactorily and were capable of becoming foremen.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

Grant v. Bethlehem Steel Corp.,
____ F. Supp. ____, 76 Civ. 847
(S.D.N.Y., Jan. 2, 1979)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 847

ROYSWORTH D. GRANT, et al.,

Plaintiffs,

—against—

BETHLEHEM STEEL CORPORATION and LOCAL 40, Bridge, Structural and Ornamental Iron Workers, AFL-CIO, et al.,

Defendants.

MEMORANDUM AND ORDER

KNAPP, D.J.

This is a class action by three ironworkers (two blacks and one dark skinned Hispanic) against Bethlehem Steel Corporation and three of its supervisory employees. Plaintiffs[1] claim that they and others similarly situated were deprived of the opportunity to become Bethlehem foremen because of their color or race. Their action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1871, 42 U.S.C. § 1981. They also seek relief for violations of Executive Order 11246, and as third-party beneficiaries under certain contracts to which Bethlehem was party. There was an eight-day trial to the court—by

1 Louis Martinez, the dark skinned Hispanic, was not an original plaintiff, but intervened in the action four months after it had commenced. Nothing turns on this circumstance and he and the original plaintiffs will be collectively referred to as "plaintiffs".

exceptionally competent counsel—between January 19th and 26th, 1978. At the close of the evidence, the court made a series of tentative findings and ruled that the record should remain open until February 6th so that counsel for any party could offer further evidence in the light of such tentative findings. No party availed itself of such opportunity. The case was finally closed, after receipt of post-trial memoranda, at an oral argument held on September 21, 1978. It is our ultimate conclusion that plaintiffs' case must fail for want of a factual basis. So that our conclusion may be effectively reviewed, we shall attempt to set forth our factual findings in considerable detail.

The action concerns Bethlehem's structural steel division which, until June of 1976 when the division's activities were discontinued and its existence terminated,[2] was engaged in erecting the steel skeletons of bridges, highrise buildings and similar structures. During the years upon which this litigation primarily focuses, 1970-1975, Bethlehem appointed a total of 126 foremen on ten projects.[3] Of these, only one was black.[4] It is not disputed that although blacks were underrepresented in the industry until at least 1970,[5] the percentage of black ironworkers in Bethlehem's employ was considerably larger than 1/126. Including apprentices and trainees, blacks filled approximately 10% of the 1018 ironworkers jobs on the ten

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2 This lawsuit would in all probability have been quickly settled by entry of a consent decree but for the fact that Bethlehem no longer employs structural ironworkers so it would be impossible to "consent" to any measures looking toward the promotion of such workers to supervisory positions.

3 The record is unclear as to whether the exact number of foremen hired was 124 (see defendant's post-trial memo. at 8) 125, or 126 (plaintiff's post-trial memo. at 55). We do not believe the difference in these figures to be of any significance and use the "126" figure without finally passing upon its accuracy.

4 For the purposes of this opinion the term "black" includes dark skinned Hispanics.

5 See E.E.O.C. v. Local 638 (S.D.N.Y. Dec. 12, 1972) 71 Civ. 2877.

projects.[6] Nor is it disputed that Bethlehem left the appointment of foremen to the uncontrolled discretion of its superintendents, and that it took no affirmative steps to counteract any inherent discriminatory effect that may have resulted from the fact that those superintendents were exclusively white. Finally, it is not disputed that the superintendents hired formen by word-of-mouth on the basis of wholly subjective criteria. Bethlehem contends, however, that business necessity (the extraordinarily hazardous nature of the work involved) made it imperative that the selection of foremen be left to the superintendents' discretion and rest upon subjective evaluation character; that word-of-mouth hiring was needed so that the availability of the best foremen could be insured well in advance of the beginning of any project; and that the record is devoid of evidence that any discrimination in fact occurred. We agree that the evidence does not establish disparate impact or any specific instance of discrimination and that Bethlehem was justified in relying upon subjective evaluations of character. It is the belief of the writer of this opinion that if Bethlehem had in fact taken affirmative steps to find qualified blacks, one or more additional black foremen would have been appointed. However, whether or not that belief be valid (which validity Bethlehem disputes) *Furnco Construction Co.* v. *Waters* (June 2, 1978) ____ U.S. ____, No. 77-369 established that Title VII does not obligate an employer to maximize the employment of blacks, but allows a finding of liability only upon a showing that its practices discriminated against them. In the absence of such a showing, the ultimate question seem to be whether, in the factual situation above described, the court may establish a presumption that if left to their own devices whites will—at least unconsciously—discriminate against blacks. It is our conclusion that this question must be answered in the negative. We shall proceed to set forth certain findings of basic fact, to be followed by a discussion of the facts and the law.

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6 Of 1018 ironworkers (including apprentices and trainees) 102 were black.

I.

Requirements for the position of foremen.

This finding is based exclusively on plaintiffs' testimony. Structural ironworkers—who are engaged in the erection of the steel skeletons of skyscrapers and similar buildings—pursue a peculiarly hazardous calling. It is a calling in which few make more than one serious mistake, because most such mistakes are fatal. The men work in "gangs", each of which is supervised by a foremen or "pusher".[7] It is the primary responsibility of the foreman to see to the safety of his gang. He must also ensure that its work is efficient and productive. Accordingly the job of foreman requires a man with a high degree of safety-consciousness and a personality capable of imbuing in his men a desire to be both safe and productive. Although some foremen's positions could be filled by men having no particular expertise in the type of work being done by the gang, no significant number could be filled by men[7a] lacking those two essential personal characteristics.

II.

Impossibility of fashioning objective criteria for a foreman's position.

We have been unable to fashion any objective criteria that would isolate the personal characteristics required for an ironworker's foreman; and plaintiffs' counsel has suggested no such criterion. We therefore find and conclude that the choice of a foreman must rest on the subjective judgment of those in charge of hiring (in this case, the superintendents Deavers and

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7 The witnesses used the term "foreman" and "pusher" indiscriminately. On the whole, they seemed to prefer "pusher". We prefer—and shall generally use—the term "foreman".

7a Although no one has contended that Bethlehem discriminated against women there has, so far as the transcript indicates, never been a woman ironworker.

Driggers).[8] The sources of information upon which such subjective discretion should be based would appear to us to be the following: (a) the superintendent's previous experience with the candidate's[9] actual performance as a foreman; (b) the recommendation of another Bethlehem superintendent who had had such experience with the candidate; (c) the superintendent's opportunity to have observed the candidate at work in a gang; (d) a recommendation from a non-Bethlehem source in whom the superintendent has confidence as to the candidate's actual performance as a foreman; (e) any other source which would give the superintendent confidence that he was making a responsible selection such as personal contact with the candidate in a social or family[10] context, recommendations from others (fellow workers or union officials) in whom the superintendent had confidence, etc., etc.

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8 In this connection, we adopt plaintiffs' position that the conduct of superintendents Deavers and Driggers is a proper focus for this lawsuit.

9 The term "candidate" is imprecise, as the evidence indicates that in many—if not most—instances the Bethlehem superintendents would seek out men to appoint as foremen, rather than accept applications for the position. However, we can think of no more accurate term.

10 We recognize that family relationships can be used for discriminatory purposes, cf. Rowe v. General Motors (5th Cir. 1972) 457 F.2d 348, 359. However the case cited highlights the difficulties of plaintiffs' position in the case at bar. In Rowe the employer was using nepotistic preference to fill jobs which required no peculiar personality characteristics and for which objective standards could easily have been established. Here, as we have seen, precisely the opposite is true. The other cases plaintiffs' cite on the "nepotism" question [U.S. v. Ironworkers Local (7th Cir. 1971) 438 F.2d 679, 683, cert. denied 404 U.S. 830; Local 53 Asbestos Workers v. Vogel (5th Cir. 1969) 407 F.2d 1047, 1054; EEOC v. Local 63] are inapposite. In each of them a union deliberately tried to confine membership to the families of their predominantly white existing members. There was no suggestion that the requirement had anything to do with the needs of the job.

III.

Bethlehem's procedures for filling foremen's positions.

Bethlehem never adopted any formal procedures for filling foremen's positions, leaving the matter pretty much to the uncontrolled discretion of the individual superintendents. However we find that, acting on an ad hoc basis, the superintendent substantially followed the order of preference set forth in the previous finding.

Hiring was accomplished by word-of-mouth. When Bethlehem superintendents first learned that Bethlehem was likely to enter into a contract for structural steel work they began to contact individuals to ask if they would be interested in foremen's work on the project in the event that it materialized. Once a contract became official, Bethlehem would post notice of it in the union hiring hall. By this time, however, the superintendents had frequently committed themselves to hire specific persons for many, if not all, of the foremen positions.

IV.

History of discrimination against blacks as ironworkers.

Prior to the enactment of Title VII there had been a long history of discrimination against blacks in the hiring of ironworkers in the New York metropolitan area. After such enactment, their situation slowly improved. The record appears to contain no reliable evidence as to the numbers of blacks employed as ironworkers prior to 1970.

V.

Statistical evidence.

Plaintiffs presented the testimony of an expert statistician, Mr. Richard Faust, who attempted to isolate the impact of race as a factor in hiring by determining the number of standard deviations between the actual and "expected" numbers of

blacks among the 126 foremen hired. Although we were deeply impressed with the caliber of Mr. Faust's testimony, we find his underlying assumptions unwarranted and therefore reject the conclusions he based upon them.

Mr. Faust's calculation of the expected number of black foremen was based on the assumption, which plaintiffs had instructed him to make, that qualifications were distributed evenly by race among the 1018 ironworkers. This assumption fails to take into account the fact that blacks were by and large relative newcomers to the industry. We cannot assume, as Mr. Faust did, that qualifications were evenly distributed among whites, many of whom had long been in the industry, and blacks, most of whom were just entering it.[11] Nor can we assume that supervisors would be as familiar with the qualifications of new employees as they would with those of men with whom they had worked over a long period.[12] More importantly, we have found that Bethlehem was entitled to give preferential consideration to the significant number of men who had prior foreman experience with the company.[13] The fact that this

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11 We also note that apprentices and trainees were included in the group of 1018 ironworkers upon which Mr. Faust based his analysis. Blacks were disproportionately overrepresented in these two categories.

12 It could be argued that the likelihood or unlikelihood of a candidate's coming to a superintendent's attention should be ignored in determining "qualification" because it is a product of the allegedly discriminatory tendencies under challenge. However accepting that argument at full value it seems clear to us that the kind of selfconfidence necessary to insure the personal characteristics found to be essential would, in many (if not most) situations, tend to develop with familiarity with the ironworkers trade and would tend to exist in higher proportion among ironworkers with more years of experience.

13 We believe that Bethlehem was justified by business necessity (see Furnco, supra) in preferring men with prior Bethlehem foreman experience. This practice allowed Bethlehem to rely on men with proven ability. Of the 126 foremen jobs, Bethlehem in fact filled 97 with men who had such experience. Of these, some 90 had gained their initial Bethlehem foreman experience prior to 1970, at a time when there were few blacks working in the industry.

group was predominantly white[14] further undermines the assumption that qualifications were distributed evenly by race. The number of standard deviations Mr. Faust found by considering all 126 jobs would be reduced had inquiry been limited, as we believe it should be, to the 29 foremen positions awarded to men who at the time had no prior Bethlehem foreman experience.[15] We expressed these misgivings, and asserted our confidence in Mr. Faust, at the close of his testimony and offered plaintiffs the opportunity to recall him at some later time. Plaintiffs' failure to have done so in the face of our articulated criticisms of the basis for his conclusions—coupled with our expression of confidence in his acumen—leads us to conclude that he did not think that any analysis incorporating our criticisms would aid plaintiffs' case. We accordingly conclude that the standard deviation analysis does not establish a *prima facie* case of discrimination.

We are left with the raw comparison between Bethlehem's non-supervisory work force, which was 10% black, and the group of 29 foremen who had no prior foreman experience for Bethlehem. Of these 29 men, one (3.45%)—Nolan Herrerra—was black. Plaintiffs urge us to disregard Herrerra's appointment for statistical purposes since he was not the "free selection" of Bethlehem's supervisors but rather was hired to placate the strong and vocal minority community surrounding the Greenpoint project at which he worked. We decline to follow this suggestion. Herrerra was not the only foreman hired to accomodate some outside group. For instance, in response to Union pressure, Bethlehem hired foremen, who happened to be white, that it would not otherwise have

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14 Nolan Herrerra and plaintiff Louis Martinez were the only blacks in this group. Neither was rehired as a Bethlehem foreman.

15 The record is unclear as to whether the exact number of such foremen was 28 (plaintiff's post-trial memo. at 87) or 29 (defendant's post-trial memo. at 66). We do not believe that this difference is significant and use the "29" figure without finally passing upon its accuracy.

selected.[16] In the absence of any indication of the extent to which such outside pressures influenced hiring, it would be statistically unsound to disregard Herrerra while still taking into account those of his white counterparts hired for analogous reasons.[17] Leaving Herrerra in the sample, we do not find the disparity between minority representation in Bethlehem's supervisory and nonsupervisory work forces to be sufficient, in a sample of this size, to make out a *prima facie* case of discrimination. If even a single additional black foreman had been hired the statistical picture would have significantly changed.[18] See *Mayor* v. *Educational Equality League* (1974) 415 U.S. 605, 621. Since Bethlehem was under no obligation to have the racial composition of its supervisory work force exactly mirror that of its non-supervisory work force,[19] we are unable to find a *prima facie* case established by statistics as fragile as these.[20]

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16 Evidence indicated that Bethlehem, on a Jersey City project, appointed two foremen who happened to be white, Messrs. Kearney and Melley, to accomodate Local 483 in New Jersey. Also see text, infra at 10, concerning Ellis' application to Pistillo.

17 Acceptance of plaintiffs' argument as a general principle would remove any incentive for voluntary compliance by leaving employers who hire more blacks to avoid Title VII liability in exactly the same position as if they had not taken such steps.

18 The addition of a single black foreman would have led to a 3.45% change in racial composition.

19 42 U.S.C. § 2000e-2(j) provides in pertinent part that:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin . . . in the available work force in any community, State, section, or other area."

20 While the statistics do not establish a *prima facie* case, they are nonethless suggestive. See Barnett v. W.T. Grant Company (4th Cir. 1975) 518 F.2d 543, 549 (disparity between 25% minority population and 19% minority work force suggestive of discrimination). The

VI.

Finally, having rejected plaintiffs' statistics, we find that the record is devoid of any other evidence that Bethlehem's practices had a discriminatory impact against blacks.

Discussion

Apart from the statistical evidence, plaintiffs' attempt to establish discriminatory impact may conveniently be divided into two categories: inferences plaintiffs would have us draw from statements made by Driggers and Deavers, both on the stand before us and in pre-trial depositions;[21] and testimony of plaintiffs themselves to claimed acts of discrimination.

Plaintiffs would have us infer from Driggers' and Deavers' depositions that certain qualified blacks therein named were passed over in favor of whites. The major difficulty with this attempt is that so far as the record indicates each of these blacks were subject to plaintiffs' subpoena and none was called. Essentially, then, plaintiffs are asking us to infer that if certain witnesses subject to their subpoena had been called such witnesses would have testified that they had been available for appointment as foremen when whites had in fact been appointed. That hardly seems a permissible inference, and we reject this line of argument.

We turn, then, to plaintiffs' testimony about their own experiences. We shall assume for purposes of this discussion that plaintiffs were in general qualified to be foremen (Grant admitted on the witness stand that he was disqualified for one of the jobs at issue) and discuss plaintiffs' contentions in the order they are mentioned in their post-trial memorandum.

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figures certainly do not demonstrate any influx of blacks into supervisory jobs after their exclusion at lower levels ended. Such suggestion, however, does not establish a *prima facie* case.

21 We reject Bethlehem's contention that there is any impropriety in plaintiffs' reliance upon the deposition testimony of party witnesses, regardless of whether or not it was referred to at trial.

(1) *Ellis' application to superintendent Pistillo.* Ellis' direct examination on that issue is as follows (tr. 473-4):

"Q And who was the superintendent on that building (Columbia-Presbyterian Hospital)?

A Mr. Frank Pistillo.

Q Did you ever have any conversations with him at any point about you doing any pusher work?

A Yes, sir.

Q Will you tell the Court what you said to him and what he said to you?

A I had been on the job about five or six weeks, I think, and I saw they had a bunch of bar joists. That is an open-weld beam with parallel cords in it. No one was moving them. So I said to Frank, "Who is going to push the bar joists?"

He said, "No one. I haven't got anyone." So I said, "Why not give the job to me?" So a little later he said, "I can't give you the job. They sent some union men out from Staten Island."

I said, "Okay," then I continued to bolt up."

Cross examination confused the simple clarity of the foregoing, but did not change its impact. There is not a word in the record to suggest that Pistillo was not truthful in his explanation (i.e. that he was motivated by a desire to keep peace with the union) or that failure to appoint Ellis had anything to do with race. Nor is there a suggestion in the evidence that the union knew of Ellis' application or was racially motivated in pressing its own candidate.

(2) *Grant's 1973 Application to Deaver on Pearl Street.* With respect to this application there is no dispute that one Sullivan had already been hired when Grant applied for the position, nor evidence that any other foreman was hired to replace Sullivan when he was laid off. Grant specifically admitted

being unqualified for the position of raising foreman (tr. 13), which appears to have been the only type of foreman's job filled after the Pearl Street conversation.[22]

(3) *Grant's Application to Deaver at Citicorp.* We are satisfied that Grant's application at Citicorp was limited to a request for a welding foreman's position,[23] and that there is no reason to reject Deaver's testimony that one O'Neal had already been hired for the only available welding foreman's position. Moreover it appears that the only foreman thereafter appointed was hired to supervise the raising gang, a job for which—as we have already noted—Grant conceded that he was unqualified.

(4) *Martinez.* There is no claim that any foreman's position was open the only time Martinez ever made an unsuccessful application. Nor is there any suggestion in the evidence that any Bethlehem official at any other time was aware that Martinez was interested in a Bethlehem job (if, indeed, he was). The best that can be said for plaintiffs' case with respect to Martinez is that if Bethlehem's heart had been in the right place they might have thought of Martinez and sought him out in order to make him a foreman. So far as we are aware, there is no authority for making that the basis of a finding of discrimination.[24]

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22 We accept Grant's testimony that there was such a conversation. However, accepting as we do Deaver's testimony that he was free of *conscious* bias against blacks, it is hardly remarkable that he should not have remembered the incident some three years later when this lawsuit was commenced.

23 While it might be said that Deaver's cross-examination cast doubt on the certainty of his recollection that Grant had used the term "welding" foreman in making the application, the written record generated by Grant satisfies us that such was indeed the case.

24 It is perhaps worthy of note that Martinez did not come to feel discriminated against until after this lawsuit had been instituted. Back in 1975—before Martinez had become inbued with litigational zeal—he flatly told his co-plaintiff Grant that "Bethlehem did not discriminate." At the close of the evidence we indicated that we had rejected Martinez' trial testimony that this remark should—if indeed he had

(5) *Applications at the Veterans Administration project.* In this situation plaintiffs have been able to show that all three applied for a foreman's position (when none was available) in November of 1975, and that some five months later while Grant was actually on the job as a welder, one DelDuca (whom we will assume to have been less qualified than plaintiffs) was appointed to a temporary position as foreman of a gang doing welding and other work. Although *McDonnell Douglas*[25] (which did not deal with an appointment made five months after the application) might conceivably give us authority to find acts of discrimination, we decline to do so. In order to find such acts we would have to conclude that when Driggers made the temporary appointment he remembered the earlier applications and decided not to honor them. We simply do not believe such to have been the case.

In trying to persuade us that such was indeed the case, plaintiffs have gone to great lengths in contrasting the "explanation" (plaintiffs' quotation marks) given by Driggers on his deposition with that given at the trial. We are not impressed with that exercise. It is inconceivable to us that Driggers had any recollection of the April 1976 incident when first asked about it in his June 1977 deposition. However—like most people subject to deposition—he somehow felt obligated to have total recall about matters which *then* seemed important. Accordingly, based on the facts presented to him by the questioner, he reconstructed what he thought his thinking

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been correctly quoted—be dismissed as "sarcasm". Having reviewed the pertinent evidence we are still satisfied that Martinez was accurately quoted and that his words correctly expressed his then opinion that Bethlehem did not discriminate. This finding rests in part upon Martinez' generally favorable experience with Bethlehem personnel. Martinez secured a foreman's job with another company, Dreier Construction, through the efforts of one Buddy Turner, who had supervised Martinez' work as a welding foreman on the Bethlehem project at Astor Plaza and had taken Martinez with him to his next project at Mt. Sinai Hospital, where there was no welding foreman.

25 McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792.

would have been and announced that such is what it had been. At trial, he went through the same process and came up with a slightly—but not dramatically—different result. Upon such human foibles, findings of fact should not rest.

We therefore conclude that plaintiffs have failed to establish either a *McDonnell Douglas* situation where a qualified black application was rejected for a position that was actually open at the time application was made or a *Griggs*[26] situation where the employer's policies—whether or not neutral on their face—actually operated to disadvantage blacks.

Plaintiffs, practically conceding these conclusions, ask us to disregard them because Bethlehem's hiring methods—especially its practice of rounding up qualified foremen before the availability of the positions became generally known—made it impossible for blacks to make the applications necessary to trigger the *McDonnell Douglas* formula. They therefore ask us to indulge the presumption—which, as above noted the writer of this opinion personally believes to be valid—that word-of-mouth hiring inevitably disadvantages blacks when administered exclusively by whites. This conclusion, plaintiffs urge, does not depend on any finding that the particular hiring personnel involved were guilty of any—even unconscious—racial animus, but rests on the simple observation that in our society people tend to draw most of their friends and acquaintances from their own ethnic group, a circumstance which would, plaintiffs urge, tend to make any white sponsor's "web of information" about available jobs more accessible to whites than to blacks. *United States* v. *Georgia Power Co.* (5th Cir. 1973) 474 F.2d 906, 925.

Although word-of-mouth hiring has been repeatedly critized as subject to abuse, *Barnett* v. *W.T. Grant Company* (4th Cir. 1975) 518 F.2d 543, 549; *Georgia Power, supra*; see *Parham* v. *Southwestern Bell Telephone Co.* (8th Cir. 1970) 433 F.2d 421, 427, it has nonetheless been recognized as a facially neutral

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26 Griggs v. Duke Power Co. (1971) 401 U.S. 424.

practice. *Gresham* v. *Chambers* (2d Cir. 1974) 501 F.2d 687, 691; *Roman* v. *ESB, Inc.* (4th Cir. 1976) 550 F.2d 1343, 1354; *Taylor* v. *Safeway Stores, Incorporated* (10th Cir. 1975) 524 F.2d 263, 271; *Georgia Power, supra*, 474 F.2d at 925. As such, it violates Title VII only when it can be shown to have disproportionately disadvantaged blacks. As we have noted, there is no evidence before us to establish such disadvantage. Although dicta could be culled from the opinions which would seem to support plaintiffs' position, we know of no decision authorizing us to create the judicial presumption plaintiffs suggest, or to hold Bethlehem liable for its failure to rebut it. We therefore conclude that plaintiffs have failed to establish a *prima facie* case under Title VII. A *fortiori*, we also conclude that plaintiffs have failed to establish any purposeful discrimination by Bethlehem in violation of 42 U.S.C. § 1981.

Nor do we think that plaintiffs can establish a case under Executive Order 11246 or under any of the contracts said to embody its terms. Were this a suit by the government, Bethlehem might well be held liable. The Order—unlike Title VII—is not satisfied with mere failure to discriminate but requires an employer to take steps to maximize the employment of blacks. However, it appears to be well settled that the Order can be enforced only by the government and will not support a suit by a private plaintiff. *Farkas* v. *Texas Instrument, Inc.* (5th Cir. 1967) 375 F.2d 629, *cert. denied*, 389 U.S. 977; *Farmer* v. *Philadelphia Elec. Co.* (3d Cir. 1964) 329 F.2d 3; *Droughn* v. *FMC Corp.* (E.D. Pa. 1977) 74 F.R.D. 639.

A fatal defect in plaintiffs' attempt to base a claim as third-party beneficiaries under contracts said to embody the terms of the Order is that, as contract plaintiffs, they would have to bear the burden of proving that they had been damaged by a breach. The claim that plaintiffs or members of their class were actually damaged by Bethlehem's failure to carry out its obligations under the Order is far too speculative to support an action sounding in contract.

We therefore conclude that plaintiffs' complaint must be dismissed. Let defendant submit a judgment on five (5) days' notice.

Dated: New York, New York
December 27, 1978.

WHITMAN KNAPP,
U.S.D.J.

APPENDIX C

Statutes

CIVIL RIGHTS ACT OF 1964, TITLE VII

Section 703(a), Pub.L.No. 88-352 § 703(a),
78 Stat. 255 [42 U.S.C. § 2000e-2(a)].

(a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), Pub.L.No. 88-352 § 703(h),
78 Stat. 255 [42 U.S.C. § 2000e-2(h)].

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action

APPENDIX D

Opinion of the United States Court of Appeals for the Sixth Circuit in *Chrisner v. Complete Auto Transit, Inc.*, ____ F.2d ____, No. 78-1337 (6th Cir. March 19, 1981).

D-1

No. 78-1337

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARY R. CHRISNER,
Plaintiff-Appellee,

v.

COMPLETE AUTO TRANSIT, INC.,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 19, 1981

Before: KEITH and MERRITT, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge, delivered the opinion of the Court in which MERRITT, Circuit Judge, joined. KEITH, Circuit Judge, (pp. 18-28) filed a separate opinion concurring in part and dissenting in part.

CELEBREZZE, Senior Circuit Judge. Complete Auto Transit appeals from a judgment finding it in violation of Sec. 703 (A)(2) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000(e) *et seq*. The district court held Complete Auto responsible for illegal sex discrimination against plaintiff Mary Chrisner when it failed to hire her for a position as yard employee. It ruled that Complete Auto's hiring policies concerning truck-driving yard employees were violative of Title VII.

The action was brought against Complete Auto Transit by Ms. Mary Chrisner in the United States District Court for

the Eastern District of Michigan. Complete Auto is a Michigan corporation engaged in the business of transporting new automobiles by tractor-trailer combinations from the point of manufacture to dealers across the country. To facilitate the transfer of the new automobiles, Complete Auto operates terminals throughout the nation. Only its Willow Run terminal in Ypsilanti, Michigan is involved in the present case.

The Willow Run Terminal is adjacent to a General Motors automobile manufacturing plant. As new cars come off the G.M. assembly lines, the vehicles are driven to Complete Auto's terminal, where yard employees working on the "release gate crew" receive and inspect the vehicles, assign them special identification numbers, and transport them to a yard marshalling area. The new vehicles are subsequently taken to a dock area and loaded onto large tractor-trailer combinations. These trucks then deliver the automobiles, and after completing delivery, the standard operating procedure is for the driver to deposit his empty tractor-trailer in the terminal yard for reloading. The volume is sufficiently great that as many as eight empty trucks can accumulate before the beginning of the first shift. In order for loading operations to commence in an orderly fashion, the trucks must be jockeyed about the yard and, when necessary, driven to an overflow lot. Rearranging the trucks in the yard and driving them to the overflow lot is an important, albeit minor, responsibility of the yard employees.

In 1973, General Motors increased production at the plants served by the Willow Run terminal to an extent that Complete Auto's existent facilities were unable to accomodate the stepped-up production. In an attempt to handle the overflow, Complete Auto acquired space at the Willow Run Airport, which is, using the public highways, about one mile from the terminal. The acquisition of space at the airport meant that yard employees would have to transport the tractor-trailers from the terminal to the overflow lot using public highways. When operations were confined to the terminal the

driving of the large trucks by yard employees was also restricted to that area.

In response to this change in operating procedure, as well as union pressure regarding periodic layoffs of yard employees who could not be transferred to a truck driving position because they were not qualified, Complete Auto implemented a new hiring requirement for yard employees: to merit consideration a prospective yard employee needed to have two years of truck driving experience or have completed a course of study at a truck driving school. These prerequisites were not retroactively imposed on employees working in the yard in 1973 because provisions in the collective bargaining agreement would not allow such a change.

On February 11, 1976, Mary Chrisner applied for a position as a yard employee at the Willow Run terminal. She had not attended or completed truck driving school and did not have the requisite two years of truck driving experience. Complete Auto rejected Chrisner's application because she failed to meet either job requirement.[1]

In August, 1976, the Willow Run terminal experienced a wildcat strike by an estimated 80 or 90 employees. Economic pressures generated by this wildcat strike forced Complete Auto to abandon temporarily its policy of requiring applicants to possess either two years experience or appropriate schooling in order to gain employment as a yard employee. The company decided that it would, during the duration of the strike, train the employees in the operation of tractor-trailers. Nine new persons, including Ms. Chrisner, were hired to work in the yard during the strike. Ms. Chrisner's employment, together with that of seven other temporary employees, was terminated at the end of the strike. The remaining temporary employee was released one week later.

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[1] The parties stipulated that the sole basis for the rejection of plaintiff's job application was the fact that she failed to have either prerequisite required by Complete Auto.

After the strike had ended the company did not revert to the more stringent qualifications for yard employees. Instead, Complete Auto required only a chauffeur's license and a physical examination. If necessary, new yard employees received on-the-job training from the company to drive the tractor-trailers.

In April, 1977, Ms. Chrisner filed the present action alleging that Complete Auto's initial refusal to hire her for the job of yard employee was a decision based solely on her gender. After a trial before a United States Magistrate, the District Court examined the record and concluded that the plaintiff had established a prima facie case of disparate impact discrimination and that the defendant had not successfully rebutted that case by establishing a business necessity defense. Specifically, the district court found that the two year experience requirement acted as a "grandfather clause" in perpetuating the exclusion of females from the trucking industry. The court also concluded that alternatives were available to Complete Auto which would have accomplished Complete Auto's stated goals while minimizing the discriminatory impact of its job requirements. In its final judgment order, the court ordered Complete Auto to pay Ms. Chrisner $35,742.18 in back pay, $6,000.00 in attorneys' fees and costs of $417.62; Complete Auto was also ordered to cease discriminatory action against Ms. Chrisner, to offer her a job as a yard employee with retroactive seniority and all fringe benefits according to a seniority date of April 28, 1976.

I.

The ultimate goal of Title VII is the elimination of "discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). The same goal is equally applicable to sex discrimination. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). In enacting Title VII, Congress required "the removal of arti-

ficial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971).

Title VII cases comprise a tripartite life cycle. The initial burden on a Title VII plaintiff is to establish a prima facie case of employment discrimination. The burden then shifts to the defendant to prove or demonstrate a defense to the apparent discrimination. If the defendant successfully rebutts the prima facie case, the burden then shifts back to the plaintiff to show that there are alternative available selection devices without similar discriminatory effect which would also serve the employer's legitimate interest in efficient and trustworthy workmanship.

Under the current law surrounding Title VII, two separate but related theories are available to prove a prima facie case of employment discrimination: disparate impact and disparate treatment. "Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters* v. *United States*, 431 U.S. 324, 305 n. 15. Claims of disparate treatment may be distinguished from claims that stress disparate impact. Disparate impact cases involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, the Supreme Court has held, is not required under a disparate impact theory. Compare *Griggs*, *supra*, at 430-32 with *McDonnell Douglas*, *supra*, 411 U.S. at 802-806. Either theory may, of course, be applied to a particular set of facts. *Teamsters* v. *United States*, 431 U.S. at 335-36 n. 15.

Central to both theories of liability where sex discrimination is alleged is the existence of an identifiable employment practice or policy that demonstrably effects all members of a class in a substantially similar, if not an identical manner. In disparate treatment cases, this is the pattern or practice followed as an employer's regular or standard operating procedure which treats women in relatively unfavorable ways so that it justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex. *See Teamsters, supra,* at 336. In disparate impact cases, it is the practice or policy which, although theoretically neutral or benign in a sex related context, nevertheless has a disproportionate adverse impact upon females without any justification of business necessity. Disparate impact analysis is properly applied where the discrimination results not from the decision to employ a challenged practice, but from its effect. In the instant case the plaintiff does not challenge Complete Auto's decision implementing the schooling or experience requirements. Rather, the focus is on the effect of those hiring requirements.

The thrust of the claim that the two year experience or schooling requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. What Ms. Chrisner does contend is that these facially neutral prerequisites operate disproportionately to exclude women from eligibility for employment as yard employees with Complete Auto. To establish a prima facie case, she need only show that these employment standards select applicants for hire in a significantly discriminatory pattern. *Dothard, supra,* at 329; *Griggs, supra,* at 432.[2] *See also New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584 (1979).

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[2] The correct focus is on the aggregate impact of the combined qualifications. *Smith* v. *Troyan,* 520 F.2d 492, 498 (6th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976). Of course, the plaintiff does not have to show a disparate character in both aspects of the job selection scheme in order to demonstrate that the overall policy had a disparate impact on women. For instance, if the company selected roughly

The evidence in the record indicated that a study by the American Trucking Association based on 1970 Census data showed that only one half of one percent (.5%) of all truck drivers were female.[3] In considering the effect of the two year experience requirement, the district court concluded that it served to perpetuate the exclusion of females from the trucking industry. The proper focus when determining impact is on those excluded by the requirement. *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 899 (5th Cir. 1978).[4] The experience requirement automatically disqualifies all people who have not accumulated two years of experience driving a truck, a vast majority of whom would be females given their gross underrepresentation in the trucking industry when the experience requirement was implemented in 1973.

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equal numbers of applicants from the "experience pool" and the "school pool," and the "experience pool" were made up of a disproportionately large number of men, then the "school pool" would have to be disproportionately female in order for the policy as a whole not to have disparate impact. Here, the Magistrate found that the disparate effect of the experience requirement was only "partly tempered by the alternative requirement that a person with a certificate from a truck driving school would also be considered for employment." Therefore, the Magistrate found that the company's selection policy overall had a disparate effect, because there was no reason to believe the "school pool" was disproportionately female.

[3] "Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Sec. 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." *Teamsters, supra*, at 339-40 n. 20.

Complete Auto complains that the vitality of the 1970 statistic was sapped by the passage of time, rendering that figure too unreliable for use in a prima facie case. While we have some second thoughts about the use of employment information which was eight years old at the time of trial, particularly in view of the profound changes in society's attitudes and practices during the 1970's, we think the evidence, given the *gross* disparity, was sufficiently probative so as to allow its use here.

[4] The EEOC's Uniform Guidelines on Employee Selection Procedures (1978) indicate that a selection rate for any identifiable group i.e. (women) which is less than four fifths (80%) of the group with the highest rate (men) will generally be regarded as evidence of adverse impact. 29 C.F.R. Sec. 1607.4(D). For a valuable discussion of these guidelines, *see Guardians Assn.* v. *Civil Service Comm.*, 630 F.2d 79, 90-106 (2d Cir. 1980).

Complete Auto's representative testified that the company's statistics for female employment paralleled the national figures, noting that he could recollect Complete Auto's non-office females because they were "unique," meaning few and far between.

Complete Auto argues that a showing of scant participation by women in the trucking industry based on generalized national statistics does not establish a prima facie case of the two year experience requirement's disproportionate impact on women. In particular, it points to Chrisner's failure to adduce statistics as to how many or what percentage of females could not have satisfied this qualification, or as to what percentage of males were excluded from employment in the yard based on this requirement. *See Hazelwood School District* v. *U.S.*, 433 U.S. 299 (1977). In *Hazelwood,* the Supreme Court approved the use of comparative statistics showing a narrow labor pool defined by those qualified for employment to particular jobs available. The Court explained that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 433 U.S. at 309 n. 13. On the other hand, where the job skills in question are the kind that "many persons possess or can fairly readily acquire," general population data has proved acceptable. *Hazelwood, supra,* at 308 n. 13. *See also Teamsters, supra.* Indeed, in *Hazelwood* the Court noted that truck driving, the skill in question in *Teamsters* and here, was one readily acquired, and therefore the use of general population data was acceptable.[5]

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[5] Where the existence of necessary qualifications is not readily apparent, the burden is on the defendant to demonstrate that "the positions do in fact require special qualifications not possessed or readily acquired by the general population." *EEOC* v. *Radiator Specialty Corp.*, 610 F.2d 178, 185 (4th Cir. 1979); *Kaplan* v. *International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1358 n. 1 (9th Cir. 1975); *United States* v. *Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972).

Accordingly, a prima facie case may be established without evidence of qualifications where the inference of discrimination is supported by a compelling level of female underrepresentation in a sizeable work force. *See e.g., Fisher* v. *Procter & Gamble Mfg. Co.*, 613 F.2d 527, 544 (5th Cir. 1980).[6] Statistics concerning low female participation in an industry may be relied upon to show unequal access to that industry. In setting up a prima facie case, Chrisner was not required to provide statistical figures as to the percentage of applicants, male and female, which would be automatically disqualified by the two year experience requirement in light of the alternative statistical evidence presented. The 1970 statistical imbalance between male and female participation in the industry is sufficiently probative to allow an inference that a substantially greater percentage of females would not be able to meet the experience criterion. It was for the district court in the first instance to determine whether these statistics permitted an inference as to whether the experience requirement had a disparate impact on females.[7] Although the district court's infefence was not compelled by the data presented by the plaintiff, we are unable to conclude that its finding in this respect was clearly erroneous. *See e.g. Marsh* v. *Eaton Corp.*, — F.2d — (6th Cir. 1981) (No. 79-3345). Complete Auto was free to present evidence that its entry level hiring policy was not a distinctive circumstance supporting

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[6] *Cf. Greenspan* v. *Automobile Club of Michigan*, 495 F. Supp. 1021, (E. D. Mich. 1980) (employer that has disproportionately low number of female employees in professional, technical, and sales job violated Title VII by, among other things, reliance on unvalidated job requirements, including requirement of experience in jobs open recently only to men, by absence of systematic job description and evaluation system, and by policy of vesting managers with large degree of unsupervised discretion in matters of personnel selection); *Thompson* v. *Boyle*, 499 F. Supp. 1147 (D. D.C. 1979) (court rejects argument that statistics concerning low female participation in bookbinder program may not be relied upon to show unequal access to the program).

[7] Statistical evidence may establish a prima facie case of employment discrimination in an individual action as well as in a class action. *Davis* v. *Califano*, 613 F.2d 957, 962-63 (D.C. Cir. 1980).

the inference of discrimination. It did not offer such countervailing evidence. Under the "clearly erroneous" standard of review, we see no basis for disturbing the district court's factual findings which led to the conclusion that the two year experience requirement had a discriminatory impact on female applicants.

II.

We now turn to the appellant's contention that the challenged hiring practices are founded upon business necessity. To justify its hiring requirements as a business necessity, Complete Auto must show that its practices bear a manifest relationship to the yard workers' employment – that the practices are related to their job performance. *Dothard, supra* at 329 *quoting Griggs, supra,* at 432; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *McDonnell Douglas, supra* at 801; *Horace* v. *City of Pontiac,* 624 F.2d 765, 768 (6th Cir. 1980). If the job related qualifications are bona fide, they may "measure the person for the job and not the person in the abstract. *Dothard, supra,* at 332 quoting *Griggs, supra,* at 436.

A close reading of the record reveals that the district court misconceived the nature of the business necessity defense and the corresponding quantum of proof necessary to corroborate that defense. The court below stated:

> "Now, certainly it is not the function of the court to suggest or to minimize the suggestion that anyone who takes a truck out on the public highway ought to be completely qualified and bear in mind the economic impact of the company as a result of accidents and so forth that the company would be entitled to say we don't want our trucks taken out on the highway without there being a qualified driver at the wheel is certainly a compelling business necessity. However, in terms of this case, I don't find that there was a compelling business necessity as that term is described in *Duke Power* and the other cases

> that would override this otherwise neutral and otherwise appropriate company requirement . . . so there is a disparate impact and the requirement in my opinion does not — is not for a sufficient compelling reason. There were alternatives available to the company . . ."

In other words, the District Judge rejected Complete Auto's business necessity defense solely because he believed that the company had not shown the unavailability of alternative hiring procedures which would have less of an adverse impact on female applicants. This truncated analysis misconstrues the shifting burdens of employment discrimination law. In disparate impact cases, a Title VII defendant does not bear the burden of showing that its practice or policy embodies the concept of least discriminating alternative. Complete Auto should not have been compelled to disprove the existence of feasible, alternative methods for hiring yard employees. To the contrary, Ms. Chrisner bears the burden of affirmatively proving the existence of an alternative with a lesser disparate impact. The district court's analysis unjustifiably collapsed the three-step test employed in *Griggs* into a two-step examination in which the defendant, in order to successfully establish a business necessity defense, was burdened with proving to the court's satisfaction that its hiring requirements would have the least disparate impact of all conceivable requirements which satisfactorily measure applicants for employment. By placing too great of a burden on the defendant, this analysis renders the third step of the Title VII inquiry superfluous.[8] The correct approach requires that the defen-

[8] In *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978), the Supreme Court vacated and remanded the First Circuit's decision in a disparate treatment case because it appeared that the Court of Appeals had imposed a heavier burden on the employer than *Furnco Construction Company* v. *Waters*, 438 U.S. 567 (1978) required with respect to meeting the employee's prima facie case of discrimination. Although the Court of Appeal's analysis was unclear, it apparently had burdened the employer with proving the absence of a discriminatory motive instead of simply requiring the articulation of some legitimate, non-discriminatory reason for the employee's rejection. This con-

dant attempt to rebut the prima facie case of employment discrimination by showing that its hiring policy is "manifestly related" to the job requirements. If the manifest relation is shown, then the business necessity defense is complete and the burden then shifts to the plaintiff to show that there are alternative selection devices without a similar discriminatory effect which would also serve the legitimate needs of the employer.

Misunderstanding of this bifurcated approach may well be engendered by the appelation of the defense itself. Literally construed, it would not be unreasonable to conclude that proof of a "business necessity" defense requires a showing that the practice is absolutely necessary or inherently essential to the operation of the business.[9] Such a standard, however,

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struction was erroneous because it made superfluous the third step in the *Furnco-McDonnell Douglas* analysis; it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring such proof from the employee as a part of the third step. Because these burdens of proof are distinctly different, *Sweeney, supra,* at 25, the Supreme Court believed it necessary to remand the case for reconsideration in light of *Furnco. See also Texas Dept. of Community Affairs* v. *Burdine,* 49 U.S.L.W. 4214 (No. 79-1764 March 4, 1981).

Sweeney suggests that a remand for reconsideration of Complete Auto's business necessity defense might be appropriate because the district court condensed the relevant three stage analysis into two steps and went awry by imposing the burden on the employer to *disprove* the existence of an available alternative instead of requiring the plaintiff to *prove* such an option was within reach. That error, however, belies the necessity for a remand on this point. The district court specifically found that having "a qualified driver at the wheel is certainly a compelling business necessity," and that but for the availability of a policy with less of a disparate impact, the experience prerequisite was an "otherwise neutral and otherwise appropriate company requirement." These findings persuade us that the district court found the company's hiring policy was manifestly related to the job requirements. On the record before us we cannot characterize these findings as erroneous. And the failure of the trial judge to couch his findings in the precise language of *Griggs* does not necessitate a remand. *See James* v. *Newspaper Agency Corp.,* 591 F.2d 579, 583 (10th Cir. 1979).

[9] For example, in requiring that there exist more than a business purpose for adhering to a practice, courts have demanded the presence of an overriding and compelling business purpose. *Kirby* v. *Colony Furn. Co.,* 613 F.2d 696 (8th Cir. 1980) ("The proper standard is

would direct unwarranted strict scrutiny at the defendant's asserted justifications and has not been adopted by the Supreme Court. The proper test, as we see it, is the "manifest relationship" test enunciated in *Griggs* and its progeny which looks to whether the discriminatory employment practice is necessary to safe and efficient job performance. *Dothard*, *supra* at 332 n. 14. For a practice to be "necessary" however, it need not be the *sine qua non* of job performance; indispens-

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. . . whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove there is *no* alternative to the challenged practice."); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978). *Head* v. *Timken Rollerbearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973). *Campbell* v. *Ramsey*, 484 F. Supp. 190, 194 (E.D. Ark. 1980). The genesis of this approach appears to be *Robinson* v. *Lorillard Co.*, 444 F.2d 791, 798 (4th Cir.), *cert. denied* 404 U.S. 1006 (1971).

The dissent argues that the force of *Sweeney*, *supra*, necessitates a remand because the district court did not make the requisite findings on the business necessity defense when it condensed the Title VII analysis into two step. Nevertheless, it proceeds to assert that under *Head* v. *Timken Roller Bearing*, *supra*, the employer has not established a business necessity defense because the company subsequently used alternative selection devices. The dissent concedes the flaw in its analysis by ignoring the full force of *Sweeney*. Decided by the Supreme Cour five years after *Head*, *Sweeney* stands for the proposition that the three-part Title VII analysis cannot properly be conducted in only two stages. The dissent's approach, which compels an employer to prove a business necessity defense by showing that there exist no less discriminatory alternatives, is, in essence, a two-stage analysis since it renders the third step superflous. If an employer does prove a business necessity defense, that is, there are no alternative policies with a lesser discriminatory impact, a plaintiff would thereby be precluded from atempting to show that there are available alternatives — the crucial third stage of Title VII analysis. *Griggs* does not countenance denying a plaintiff the opportunity to rebut a business necessity defense under any circumstances, but that is precisely the result invited by the dissent's approach. An equally unsatisfactory result accrues when the other possibility is considered. If an employer does not prove the absence of alternative policies, that would be the equivalent of affirmatively establishing that there are, in fact, viable alternatives. The burden of establishing the presence of available alternatives, however, belongs only to the plaintiff and must be sustained in the third stage of the analysis. Such an erroneous allocation of the burden of proof is exactly the practice rejected by *Sweeney*.

This illustrates the dilemma the dissent puts itself in by arguing that a remand is necessary under *Sweeney* because the trial court collapsed the three step inquiry into two steps, and at the same time relying on *Head* v. *Timken Roller Bearing* which commands a two-step analysis. The dissent omits the full language of *Head*, which reads:

ability is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business.

Application of the business necessity defense entails considerations which are a function of the job's demands. In this regard, positions can be evaluated according to their location on the type of spectrum described in *Spurlock* v. *United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972):

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified appli-

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The court's error arose from its failure to take into account one necessary element of the test. *The test consists of two discrete parts* as set forth in *Robinson* v. *Lorillard Co.*, 444 F.2d at 798:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and *there must be available no acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (emphasis added).

Insofar as any two-part test is inconsistent with the three-part analysis outlined in *Griggs* and *McDonnell Douglas* and reinforced by *Sweeney*, it must be discarded.

The dissent's insistence that *Head* has been "consistently followed" cannot withstand the scrutiny of closer analysis. In *Horace* v. *City of Pontiac*, *supra*, this court did not cite *Head*, but rather quoted the three part test of *Griggs* and *McDonnell Douglas*. The only reference to *Head* appears in a block quote of the district court's opinion. 624 F.2d at 768. In *Mitchell* v. *Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *Head* was cited only for the proposition that females must have equal employment opportunities. 583 F.2d at 281. In *EEOC* v. *New York Times Broadcasting Service, Inc.*, 542 F.2d 356 (6th Cir. 1976), *Head's* two-step process was, in fact, followed. 542 F.2d at 361. That was not true, however, in *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), where the court relied on *Head* solely for the principle that when a seniority system lock a minority of black employees into low opportunity areas of work, while protecting the status of those of the majority, it must give way. 515 F.2d at 313. And in *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975), the court divided *Head's* second step into three sub-parts, holding that the essential finding was that the seniority practice at issue was not of compelling importance to the company's business, that whether the practice effectively carried out a business purpose was irrelevant because the challenge was directed at a facially neutral policy, and that the availability of alternatives was pertinent only to the remedy, not to liability. 513 F.2d at 1044. This "long line of

> cant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related.

In *Spurlock*, the Tenth Circuit agreed with United's contention that 500 hours of flight time was a reasonable minimum requirement to insure that applicants passed the flight officer training program. Since a flight officer is ultimately responsible for the safety of passengers as well as costly aircraft, the public interest is paramount, justifying high employment standards. An industry with the primary function of managing the safety of large numbers of passengers must be allowed more latitude in structuring the requirements which could effect the performance of a primary business objective. *See Burwell* v. *Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980) (en banc). At the other end of the spectrum, where considerations of public safety are negligible, employment standards are appropriately less demanding. For example, requirements of sales experience and sales motivation for entry into a securities sales representative training program failed to satisfy the business necessity standard. *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977).

Complete Auto argues that its experience/schooling criteria were reasonable minimum requirements to insure that yard employees wer qualified to operate tractor trailers on the public highways in a safe and efficient manner. The yard

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subsequent decisions" hardly constitutes a litany of faithful adherence to *Head* as suggested by the dissent.

employees are called upon to drive tractor-trailers to the overflow lot over the public highways. The performance of this task in a satisfactory manner requires a certain degree of skill in operating the tractor-trailers. The company's goal of transporting its freight in a safe and efficient manner is significantly served by hiring experienced truck operators. An individual who possesses experience in driving large, unwieldy vehicles is obviously a more rational choice for the job than is a person who does not have demonstrated ability to drive such vehicles. In this respect, the experience requirement accurately reflects the capacity of an applicant to do the job for which he is applying. There is some risk to the public safety, as well as to the driver and truck, in the employment of an unqualified yard employee. The important public interest in safety on the roads and highways, *see Mackey* v. *Montrym*, 443 U.S. 1, 18 (1979); *Dickson* v. *Love*, 431 U.S. 105, 114 (1977), is sufficiently weighty to convince us that Complete Auto's experience requirement for yard employees is manifestly related to the safe and efficient operation of its business of transporting automobiles over the public highways.

III.

Once the defendant in a Title VII disparate impact case has rebutted the plaintiff's prima facie case by proving a business necessity defense to the challenged practice, the burden shifts back to the plaintiff. To establish liability at this point, the plaintiff must demonstrate that there is an alternative selection device with a disparate impact less than that of the challenged practice which would still serve the employer's legitimate interests in efficiency and trustworthy workmanship. *Griggs*, *supra*, at 432; *Albemarle*, *supra*, at 425. Because the district court failed to consider this as a separate stage in the analytical framework of the case, we remand the case for the court to conduct a hearing on this issue. In determining whether the plaintiff has sustained her burden in proving the

existence of a viable alternative hiring procedure, the court should consider evidence that the plaintiff might introduce on a variety of factors. Certainly any subsequent practices adopted by the company would be relevant. The hiring policies of comparable businesses might also shed some light on what constitutes a feasible alternative. Of course, the marginal cost of another hiring policy and its implications for public safety are factors which should not be omitted from consideration. In any event, the initial determination must rest with the trial court.[10]

The decision of the district court is affirmed in part and vacated and remanded in part.

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[10] Complete Auto relies on the recent decision in *Furnco*, *supra*, for the proposition that courts should not restructure business practices unless mandated by Congress to do so. The Supreme Court stated with regard to the employer's burden for articulating a legitimate non-discriminatory reason for the rejection of the plaintiff, that "to prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the most employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." 438 U.S. at 577-78. The inquiry is not terminated, however, by the demonstration of such a legitimate non-discriminatory reason. The plaintiff may then show that the proffered justification was merely a pretext for discrimination. The disparate treatment analysis in *Furnco* does imply that the plaintiff cannot establish a "pretext" by showing that alternative procedures for hiring more minorities were available. Thus, in disparate treatment cases it is true that courts should not restructure business practices unless a violation of Title VII is well established. On the other hand, in a disparate impact case a plaintiff may still establish a case of employment discrimination by demonstrating that there were alternative selection devices available that would have less of a disparate impact than the hiring procedures employed by the company.

KEITH, Circuit Judge, concurring in part and dissenting in part. I join Parts I and III of the court's decision, but I am unable to join Part II for two reasons: first, the majority misconstrues language in the trial court opinion, and second, the majority applies a legal standard which is contrary to Sixth Circuit precedent.

A.

In Part II, the majority examines the concept of business necessity under *Griggs* v. *Duke Power*, 401 U.S. 424 (1971). Before grappling with this issue, it notes that the trial court below failed to correctly apply both the business necessity and the less discriminatory alternatives concepts – the second and third stages respectively of the *Griggs* analysis. Nevertheless, the majority concludes at footnote eight of the opinion that "[T]he district court specifically found that 'having a qualified driver at the wheel is certainly a compelling business necessity,' and that but for the availability of a policy with less of a disparate impact, the experience prerequisite was an '*otherwise neutral* and *otherwise appropriate* company requirement.'" In my view, the majority misreads the district court. The relevant portion of the district court opinion reads more fully:

> . . . in terms of this case, *I don't find that there was a compelling business necessity* as that term is described in *Duke Power* and the other cases that would override this *otherwise neutral* and *otherwise appropriate* company requirement. In other words, the decision of the company in 1973 was not motivated by consideration of discrimination; it was motivated according to the testimony by two factors, one, the idea that the . . . yard employees are required or were required to drive these rigs, these trucks over the public highway and also that the company thought, after some discussion with the union, that it would be appropriate to have a system whereby first, prior, or the – for other jobs could be given to company

> employees in the first place rather than going out on the street and hiring fresh employees. But that requirement in my judgment did not have a disparate effect. It did tend to freeze out the previously excluded . . . So there is a disparate impact and that requirement in my opinion does not — is not for a sufficient compelling reason. There were alternatives available to the company. (Emphasis added).

In order to reach the conclusion that the district court made a factual finding of business necessity, the majority interprets the above language as follows: the company's selection device was "otherwise appropriate" absent the existence of "alternatives available to the company." This construction takes the phase "otherwise appropriate" out of context. The sentences which immediately follow the phrase in the text of the district court opinion discuss disparate impact. They do not discuss available alternatives. They do make clear that the trial court sought to convey only that the selection device was "otherwise appropriate" absent its *disparate impact* upon women. In other words, the trial court merely observed in the opinion that the company's selection device was neutral on its face and that adoption of the device "was not motivated by consideration of discrimination." Therefore it is unreasonable for this court to construe the relevant portion of the trial court opinion as meaning anything other than that there was "no compelling business necessity as the term is used in *Duke Power*."[1]

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[1] The trial court did state:

> Now certainly it is not the function of the court to suggest or minimize the suggestion that anyone who takes a truck out on the public highway ought to be completely qualified and bear in mind the economic impact of the company as a result of accidents and so forth to the company.

The majority interprets this language in a manner that would undergird its conclusion that the trial court made a finding of business necessity. However, two points are plainly evident concerning the above language: (1) the trial court was speaking in

It follows then that the majority should not have reviewed the merits of the company's business necessity contention. The majority offers two explanations for its decision to do so: that the district court implicitly found business necessity and, at footnote eight, that "the failure of the trial judge to couch his findings in the precise language of *Griggs* does not necessitate a remand." These explanations do not withstand analysis. First, as I have discussed, a proper reading of the district court opinion reveals that the trial court actually made no such finding of business necessity. Second, we do not have before us the problem of a trial court simply failing to use the precise terminology of *Griggs*, as was the case in *James* v. *Newspaper Agency Corp.*, 591 F.2d 579, 583 (10th Cir. 1972).[2] The terminology point is a red herring. The real reason this court should have remanded the business necessity issue for reconsideration is that the trial court collapsed the second and third stages of the *Griggs* analysis. Because of this error it is impossible to determine if the district court reasoned properly before making its factual finding as to business necessity.

In a closely analogous situation, the Supreme Court remanded for reconsideration a lower court's finding of Title VII liability. *See Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978) (The Court remanded the case because the court of

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general terms and was not specifically referring to the case before it — in fact, the next sentence in the opinion begins "[H]owever, in terms of this case . . . ," and (2) the trial court never stated that Complete Auto Transit's selective device was the kind of criterion it had in mind in order for a driver to be "completely qualified." If anything, subsequent language in the opinion indicates otherwise. As a result, the language quoted above cannot support the notion that the trial court made a finding of business necessity.

[2] The majority cited *James* v. *Newspaper Agency Corp.*, *supra*, for support of its decision not to remand the business necessity defense issue. In *James*, the Tenth Circuit held that the district court "substantially followed the guidelines of *McDonnell Douglass* v. *Green*" and "the fact that the trial judge's findings are not couched in the precise language of *McDonnell Douglass*, *Furnco* and *Rich* does not necessitate a reversal." 591 F.2d at 579. In the instant case, however, the district court used precise *Griggs*-type terminology, *e.g.* "disparate impact," "business necessity," *etc.*, in support of its ruling against the company. Therefore, *James* has no applicability here.

appeals collapsed the second and third stages of the *McDonnell Douglass* Title VII analysis). Under a *Sweeney*-like rationale, this court should have remanded the business necessity issue to the trial court for reconsideration. *See Grano* v. *Dept. of Development*, — F.2d —, No. 78-3161, slip op. at 15 n.8 (6th Cir. Dec. 10, 1980); *Sweeney* v. *Board of Trustees of Keene College*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 733 (1980); *DPOA* v. *Young*, 608 F.2d 671, 692-98 (6th Cir. 1979) (remanding reverse discrimination case where trial court applied an incorrect legal standard as to the constitutional issues).[3] Instead, the majority went on to "affirm" the district court as to this issue because in its view the "finding" of business necessity was not clearly erroneous.[4] The majority thus affirms a finding that was never made.

B.

In further support of its ruling, the majority opines that proof of business necessity does not require a showing that the practice is "absolutely necessary or inherently essential to the operation of the business . . . For a practice to be 'necessary' . . . it need not be the *sine qua non* of a job performance . . ." Going further, the majority endorses an approach taken by the Tenth Circuit in *Spurlock* v. *United Airlines*, 475 F.2d 216 (10th Cir. 1972), and concludes that

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[3] Moreover, the majority's decision to review the business necessity issue is inconsistent with its decision to remand the less discriminatory alternatives issue for further consideration. Part III of the majority opinion makes clear that the court remanded the less discriminatory alternatives issue because the district court consolidated the second and third stages of the *Griggs* equation. It is my view that the business necessity issue should have been handled the same way. The district court should have been ordered to reconsider the business necessity issue, and to reconsider the less discriminatory alternatives issue if it found that the company made out a business necessity defense.

[4] In an ironic twist, the company, which had the burden on appeal of showing that the district court's refusal to find business necessity was in clear error, now finds itself the beneficiary of the "clearly erroneous" standard of review by virtue of this court's misreading of the trial court opinion.

because of "[T]he important public interest in safety on the roads and highways" the company's hiring requirements were manifestly related to the safe and efficient operation of its business. This analysis of business necessity is contrary to long-established precedent in this circuit.

As the majority correctly observes, the courts of appeals have taken two approaches in providing a description of the second stage of the *Griggs* equation that goes beyond the meaning conveyed by the conclusory phrases "business necessity" and "manifest relationship."[5] This circuit selected its approach in

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[5] In *Griggs* v. *Duke Power Co.*, *supra*, the Supreme Court held that Title VII prohibits selection "practice that are fair in form, but discriminatory in operation, the "touchstone" being "business necessity." 401 U.S. at 431. However, the Court in that case did not establish a judicial standard for determining when specific practices are protected by the business necessity defense, since Duke Power concededly adopted the selection devices at issue "without meaningful study of their relationship to job performance." *Id.* at 425-6, 431.

The Supreme Court next addressed the business necessity issue in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), in which the court held that EEOC Guidelines are entitled to "great deference" in determining whether test score selection practices are manifestly job related. In *New York City Transit Authority* v. *Beazer*, 99 S.Ct. 1355 (1979), the Court held that the plaintiffs' statistical showing failed to establish disparate impact. In addition, the *Beazer*, majority noted in *dicta* that the selection device bore a "manifest relationship" to the employer's business goals of safety and efficiency. In neither of the Court's post-*Griggs* decisions, was further explication given on the nature of the business necessity defense with respect to the kind of non-scored objective selection criteria employed here by Complete Auto Transit.

Since *Griggs* the courts of appeals have had the opportunity to further define the business necessity defense. They have taken basically two approaches. A few of the courts have adopted a broad view of business necessity. *See, e.g., Spurlock* v. *United States*, *supra*. A majority of the courts, however, construe the defense narrowly. *See, e.g., Kirby* v. *Colony Furn. Co.*, 613 F.2d 696 (8th Cir. 1980); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1377 (9th Cir. 1979) (the business necessity defense is "very narrow"); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1975); *Green* v. *Missouri Pac. R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (business necessity "connotes an irresistable demand"); *United States* v. *St. Louis-S.F. Ry.*, 464 F.2d 301, 308 (8th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1116 (1973); (the test is whether there is "compelling need"); and *United States* v. *Bethleham Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971) ("compelling need"). These two approaches are inconsistent, *see* Note, The Business Necessity Defense to Dispute Impact Liability Under Title VII, 46 U of CHI. L. REV. 911, 219 n.48 (1979), and both have their supporters among the commentators. *See, e.g.*, id. at 933-4 (broad view of the defense required by legisla-

Head v. *Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973), more than a year after the Tenth Circuit rendered its decision in *Spurlock*.[6] In *Timken Roller Bearing Co.*, Judge Miller wrote for court:

> The test [for business necessity] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the

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tive history and correct reading of Supreme Court authority); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.* and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 83 (1972); (narrow view of the defense required by legislative history and case law); Jain and Ledvinka, Economic Inequality and the Concept of Employment Discrimination, 26 LAB. L. J. 570, (1975) (narrow view required by legislative history); and Note, Business Necessity under Title VII: A No Alternative Approach, 84 YALE L. J. 98, 101-2 (1974) (citing narrow view cases in support of its "no alternative" approach to the defense).

[6] By listing *Timken Roller Bearing Co.* at footnote nine as one of the cases requiring an employer to show more than a business purpose in order to make out the business necessity defense, the majority implicitly recognizes that this circuit selected its approach to defining the second stage of the *Griggs* equation in that decision.

At footnote nine, the majority asserts that adherence to *Timken Roller Bearing Co.*, is no longer in order since such an approach "which compels an employer to prove a business necessity defense by showing that there exist no less discriminatory alternatives is, in essence a two-stage analysis since it renders the third step superfluous." In my view, the majority improperly goes out of its way to construe *Timken Roller Bearing Co.* in a manner that would violate *Griggs*.

I agree that a two-stage disparate impact formula is not in accord with *Griggs*. However, *Head* v. *Timken Roller Bearing* in no way adopted such a formula. This court in *Timken Roller Bearing Co.* simply adopted the analysis of the Fourth Circuit's *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), still the leading case in the area. *See* note 8 *infra*. In that decision, the Fourth Circuit specifically stated that its strict view of business necessity was commanded by *Griggs* v. *Duke Power Co.* *See* 444 F.2d at 798 n. 6. It also stated that "there must be no acceptable alternative policies" available to the employer. The majority seizes upon this statement in order to aver that *Lorillard* and *Timken Roller Bearing Co.* misallocate the burdens of proof with respect to less discriminatory alternatives. These decisions, however, did not even address the issue of who has the burden of proving less discriminatory alternatives, much less compress the *Griggs* three-part test into a two-part test. In *Lorillard*, the Fourth Circuit merely listed the following as being required by *Griggs*: (1) compelling business purpose; (2) the

> challenged practice must effectively carry out the business purpose it is alleged to serve . . . *Id* at 879. (quoting *Robinson* v. *Lorrillard Co.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

This ruling is not an anomaly as the reference to the decision in footnote nine of the majority opinion might suggest. In fact, *Timken Roller Bearing Co.* has been consistently followed in a long line of subsequent decisions. *See, e.g.*, *Horace* v. *City of Pontiac*, 624 F.2d 765 (6th Cir. 1980); *Mitchell* v. *Mid-Continent Spring Co. of Kentucky*, 583 F.2d 275 (6th Cir. 1978); *Equal Employment Opportunity Commission* v. *New York Times Broadcasting Service, Inc.*, 542 F. 2d 356 (6th Cir. 1976); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975); *Afro-American Patrolmens League* v. *Duck*, 502 F.2d 294 (6th

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challenged practice must effectively carry out the business purpose; and (3) "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." 444 F.2d at 798. There is nothing about this set of considerations *per se* that would contravene *Griggs*. It is only when one assumes that the court meant to place the burden on the employer of proving the last issue that the analysis can be read as being inconsistent wth *Griggs*. The majority makes this unwarranted assumption and then casts aside the entire *Lorillard* analysis. In *Timken Roller Bearing Co.* we did point out that defendants have the burden of proving business necessity, but there we did not address the issue of who has the burden of proving available alternatives. 486 F.2d at 870. Thus, it is clear to me that a more reasonable interpretation of *Lorillard* and *Timken Roller Bearing Co.* is that the decisions simply require a showing of compelling need and a "close fit" in order for an employer to rebut a *prima facie* case. Since the decisions failed to discuss the burden of proving less discriminatory alternatives, the logical conclusion is that plaintiffs would have the burden — even under *Lorillard* and *Timken Roller Bearing Co.* Under this reading, the decisions are consistent with *Griggs* and with *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). This panel should have adopted this reading and applied the *Timken Roller Bearing Co.* standard here.

In the circuit's most recent decision in the area, *Horace* v. *City of Pontiac*, *supra*, this court specifically adopted the district court's invocation of the *Lorillard/Timken Roller Bearing Co.* standard. Incidently, the court also correctly allocated the burden of proving less discriminatory alternatives in that decision, belying the majori-

Cir. 1974).[7] Yet, the majority chose to ignore well established circuit precedent in order to rule in favor of the company and to endorse the controversial interpretation of business necessity employed in *Spurlock*.[8] I cannot join in this disregard for circuit precedent. The proper standard here is the one recognized in *Timken Roller Bearing Co.*, the narrow construction of the business necessity defense.

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ty's point that *Lorillard* and *Timken Roller Bearing Co.* are necessarily inconsistent with *Griggs*. *See* 624 F.2d at 768-9. At footnote nine, the majority asserts that there has not been a "litany of faithful adherence to *Head*." In fact, however, no decision of this court has heretofore even questioned the validity of *Timken Roller Bearing Co.* *See e.g. Palmer* v. *General Mills, Inc., supra* ("we find that the seniority system provided helpful but not *absolutely essential* training and experience . . . we cannot say that the system does not effectively carry out the alleged business purpose, we consider this conclusion to be of comparatively little significance in this case . . . [A]s for . . . available alternatives it does not appear that any proof was offered on this point at trial.) Therefore, the majority's suggestion — that circuit authority is somehow divided on the issue of whether the test for business necessity is a strict one — is erroneous.

It has been the policy of this circuit that one panel cannot overrule the decision of another panel absent either intervening Supreme Court authority to the contrary or other circumstances which render the precedent clearly wrong. *See Timmreck* v. *United States*, 577 F.2d 372, 377 n.15 (6th Cir. 1978) *reversed on other grounds*, 441 U.S. 780 (1979). Here, the majority departs from this policy by purporting to overrule in a footnote *Head* v. *Timken Roller Bearing Co.* It is my hope that both the majority's disregard for circuit precedent and its misanalysis of the business necessity issue will be regarded as aberrational.

[7] Other circuits have also found *Timken Roller Bearing Co.* persuasive authority. *See, e.g., Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (en banc).

[8] *See* note 5, *supra*. In *Spurlock*, the Tenth Circuit held:

> "[W]hen a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant . . . the employer should have a heavy burden to demonstrate . . . that . . . [the] criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related. 475 F.2d at 219.

The majority cites the recent Fourth Circuit *en banc* decision in *Burwell* v. *Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980) apparently as a case following the *Spurlock* rationale. In *Burwell*, the court did

As stated in the preceding section of this dissent, I do not think it was appropriate for this court to have decided whether the company made out its business necessity defense. However, since the majority goes on to decide this issue, I am compelled to express my view that the company failed to meet its burden of establishing business necessity under the *Timken Roller Bearing Co. or Robinson* v. *Lorrillard Corp.* standard.

The evidence at trial indicated that driving trucks was a very small part of the total activities of the company's yard employees. Mr. Thompson, vice-president of the company, estimated that *at most* yard employees spent four percent of their work day utilizing skills developed in over-the-road truck driver training. He also noted that some of the yard employees never drove the trucks; they worked entirely on the release gate. In addition, the evidence clearly indicates that Complete Auto Transit employees can and have performed over-the-road truck driving safely and efficiently without formal schooling or two years experience. Nine out of 16 of the employees hired before 1973 had no such training and yet they have performed the job of yard employee to the company's satisfaction. The evidence indicates that these employees were adequately prepared for the job of yard employee after undergoing a minimal amount of on-the-job training.[9]

The most compelling reason for rejecting the company's

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hold that the airline's interest in maintaining passenger safety was relevant to a determination of business necessity. However, the court made clear in its *per curiam* opinion that the test for business necessity "is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Id.* at 371. At Note 11, the court specifically stated that "[T]he criteria for establishing the defense has been no where better stated than in *Robinson* v. *Lorillard.*" (citations omitted). Therefore, contrary to what the majority suggests, it is evident that the Fourth Circuit continues to narrowly construe the business necessity defense. It does not endorse the Tenth Circuit's sliding scale approach to the allocation of burdens under the defense.

[9] In addition, Appellee Mary Chrisner satisfactorily worked as a yard employee during the 1976 wildcat strike. At the time she met neither prong of the company's selections requirements.

business necessity contention, however, is that after the wildcat strike of 1976 the company terminated its experience-school requirement.[10] The company offered absolutely no evidence to explain why the requirement was "necessary" during the four months it was in operation and then apparently unnecessary when the company terminated the requirement. From the evidence presented, it appears that Complete Auto Transit Inc. has operated safely and efficiently without the selection device. Therefore, it is erroneous for the majority to baldly conclude that the company proved that its selection device was so compelled by considerations of safety and efficiency as to override the device's grossly disparate impact on women.[11]

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[10] Although the company instituted the experience-school requirement in 1973, it hired no yard employees until April 29, 1976. Four months later, the company dropped the requirement during a wildcat strike. This requirement was never reinstituted.

At trial, the company alleged that adoption of the experience-school requirement was motivated by the need for yard employees to transport trucks to an overflow lot. This task required a short drive over the public highway. The company, however, never explained why the experience-school requirement was not necessary after 1976. Apparently, the task of transporting trucks to the overflow lot remained a small part of yard employee responsibility, but after the strike, the company began accepting applicants who had only a chauffeur's license and a physical examination. Therefore, in the absence of rebutting evidence I would think the logical conclusion is that the experience-school requirement was not "necessary" before the strike either.

The majority states: "The performance of this task in a satisfactory manner requires a certain degree of skill in operating the tractor-trailers. The company's goal of transporting its freight in a safe and efficient manner is significantly served by hiring experienced truck drivers. An individual who possesses experience in driving large, unweildy vehicles is obviously a more rational choice for the job than a person who has not demonstrated ability to drive such vehicles." These observations, however, are not sufficient to support a finding of business necessity in this case. The company never introduced evidence validating the experience-school requirement as an appropriate measure of the "degree of skill" needed to operate the trucks in a satisfactory over-the-road manner. The majority engages in troublesome appellate factfinding when it states that an applicant who meets the criteria is "obviously a more rational choice for the job" than a person who does not meet them. This kind of speculation is inappropriate, particularly in view of the fact that the company no longer subscribes to the policy.

[11] Even if *Spurlock* v. *United Airlines*, *supra*, did provide the applicable standard for this circuit, which it clearly does not, the ma-

Accordingly, the evidence below, in my view, cannot adequately support a finding of business necessity.

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jority was still incorrect in finding that Complete Auto Transit made a showing of business necessity below. It is not enough to state that safety on the roads is an important public interest. That is certainly true. But under *Griggs*, the company has the burden of proving that the selection device was manifestly related to the protection of the public interest. In other words, an employer must validate a selection device, even under *Spurlock*, by introducing evidence which demonstrates that without the selection device the public would be harmed. Complete Auto Transit made no such showing here. Indeed, the company on its own apparently concluded after the wildcat strike that the public interest was adequately served by selecting yard employees who possessed only a chauffeur's license and who had been given a physical examination.

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit Denying Bethlehem's Petition for Rehearing and Suggestion for Rehearing In Banc (Jan. 19, 1981)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 79-7225

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of January, one thousand nine hundred and eighty one.

ROYSWORTH D. GRANT and WILLIE C. ELLIS,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—and—

LOUIS MARTINEZ,

Plaintiff-Intervenor-Appellant,

BETHLEHEM STEEL CORPORATION, JAMES DEAVER, EUGENE R. DRIGGERS, and THOMAS C. CONNOLLY, individually and as agents of Bethlehem Steel Corporation, et al.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Bethlehem Steel Corporation, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO

A. Daniel Fusaro
Clerk